A HISTORY OF ENGLISH LAW;

OR AN

ATTEMPT

TO

TRACE THE RISE, PROGRESS, AND SUCCESSIVE CHANGES,

OF THE

Common Law;

FROM THE EARLIEST PERIOD TO THE PRESENT TIME.

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PREFACE.

THE subject of the following sheets is of such general interest, that any attempt to present it in a more inviting and useful form may hope to meet with a favourable reception. The labours of those learned writers, whose research, industry, and acuteness, have brought to light numerous particulars illustrative of our legal antiquities, are too voluminous to serve the purpose either of the professional student or of the public in general.

To give form and consistency to the numerous historical notices which lie scattered in the works of others, to present in a regular series all the most important facts which serve to show the state of the English Law at different periods, and to point out the various causes and consequences of the successive changes as they arose, is the object of this work. Others have, likewise, had a design in some respects similar; but have not put it into execution in such manner as to preclude all farther improvement. The works of Lord Coke abound with historical matter respecting English law; but, as he

was an expounder of the law, and history was a subordinate consideration, he furnishes nothing like a regular narrative on the subject. The same remark applies to Mr. Justice Blackstone, unless his historical sketch, at the close of his Commentaries, be excepted; but this is far too general to give a satisfactory view of the subject. Sir Matthew Hale's History of the Common Law, though bearing this title, contains fewer historical facts than either of the two preceding works; being, for the most part, dissertations on disputed points of history, interspersed, no doubt, with some observations worthy of notice. Mr. Reeves' History of English Law came so near in design and title to this work, that, when the writer first obtained a view of it, which was not until he had made some advances in his own, he conceived that nothing remained for him to do but to abridge that work, and carry it on to the present period; but on a further perusal, he found his own plan to differ in so many particulars from that pursued by Mr. Reeves, that he chose to follow his own course, and to quote that gentleman (in whose work he found much that was valuable) in the same manner as he did other authorities. These two works must therefore be considered as perfectly distinct, and differing from each other both in the selection and arrangement of the materials. Mr. Reeves' work contains much more of the old law

than what appeared to the writer of this work necessary to show the progress and successive changes of the law at different times. On the other hand, many anecdotes and facts, illustrative of the history of English Law, have found a place in this work which are not in Mr. Reeves'.

Connected with this difference in the choice of materials, is also the difference in arrangement pursued in these two works. Although both writers have followed the order of political history, yet, in detail, they have pursued a very different course. In this work the most important legal facts are mentioned at the times when they are supposed to have occurred, as far as it was possible to fix the date of such remote events; but this plan, which served to shew the general state of the law at different times, could not be invariably pursued in regard to all points of law. It was found necessary to chuse more distant intervals, when a more regular and authentic account of the subject could be given. Thus the feudal system, of which but little is known before the reign of Henry II. is there treated of at large; a general review of the law of real property, and of the changes it had undergone since the time of that prince, is taken in the reign of Edward IV. and again in that of Charles II. The rise and progress of parliaments are treated of at large, in the reigns of Edward III. and Charles II.,

and the same may be said of the criminal law and other particulars.

The writer has not swelled his pages with comments, which were not immediately connected with the subject of the history, but he has been solicitous to omit nothing which could render the work useful and interesting. If he should be so fortunate as to obtain the credit of having performed his part with fidelity and accuracy, he will feel himself amply compensated for the painful labour bestowed upon the completion of an undertaking, which, though neither extensive nor novel, has nevertheless been found arduous.



HISTORY

OF

ENGLISH LAW.

INTRODUCTION.

Common Law.—Lex non Scripta.—Civil Law.—Canon Law.—Statute Law.

INTROD.

BEFORE we proceed to a History of English Law, it is necessary to premise, that the laws of England may be divided into four distinct branches or heads; namely, the common law, civil law, canon law, and statute law.

Common law.

Hale's Hist. Com. Law, c. 1.

What is called the common law consists of a collection of customs and maxims, which derive their binding power, and the force of laws, from long and immemorial usage, coupled with the express sanction, or the tacit consent, of the legislature. The customs, of which the common law is composed, are either general or particular. General customs comprehend what is properly called the common law, whereby the proceedings in the King's ordinary courts are directed. By this law is determined for the most part the course of descents of lands; the nature, extent, and qualifications of estates; the rules of settling and transferring property; the forms, solemnities, and obligations of contracts; the rules for expounding wills, and acts of parliament; and the respective remedies of civil injuries, with a variety of other particulars to be noticed hereafter.

Particular customs are such as affect particular dis-

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tricts, or relate to particular subjects. Of this description is the custom of gavelkind in Kent and other places, where all the sons succeed alike to the inheritance; or that of borough-English, prevailing in some ancient boroughs, where the younger sons inherit in preference to the elder; such also are the customs peculiar to some manors, which bind all the copyhold and customary tenants; as likewise the custom of London, &c. Of those which relate to special subjects may be reckoned the *lex coronæ*, or the prerogative of the crown; *lex mercatoria*, or law merchant; *lex forestæ*, the forest law.

Besides, as it is the business of the common law courts to define what customs are good, and what not; as also to expound and interpret the statutes, and apply them to particular cases, their decisions acquire the force and authority of precedents and rules of law, and, being recorded in the books of reports, form a part of the common law.

Leg. Edw. Conf. apud LL. Angl. Sax. Plowd. Case of Mines, 315. Pref. to 8 Rep. Dugd. Orig. Jur. c. 1. Magna Charta, c. 29. Stat. Mert. c. 9. Stat. 18 Ed. 1.

This branch of English law was called *lex communis*, or *jus commune*, because it was the common municipal law or rule of justice in the kingdom; or drawn from the several particular codes then in use, because it was admitted by the common sense of mankind, being, as Plowden observes, no other than pure and tried reason, or, in the words of Sir Edward Coke, the "perfection of reason." Sometimes it was styled, by way of eminence, *lex terræ*, *lex Angliæ*, and likewise *lex et consuetudo regni et lex patriæ*, because it was as it were ingrafted into and became a part of the constitution of the country.

Lex non scripta.

One of the most remarkable designations of the common law was that of *lex non scripta*, which it derives from its own nature, because there are no records extant to show its legislative enactment, it being one of its peculiar perfections, that it has been in use time out of mind, or, in the solemn language of the law, time whereof the memory of man runneth not to the contrary. The common laws of England, says Lord Chancellor Ellesmere, are grounded upon the law of God and extend themselves to the original law of

Ellesmere Disc. on the Postnati.

nature, and the universal law of nations, and are not originally *leges scriptæ*.

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The term *lex non scripta*, although peculiarly applicable to the common law, to distinguish it from the *lex scripta* of the statute law, yet it does not necessarily imply that the laws so denominated are not extant in writing, for there are but few of our laws of which there is not some memorial in writing. The term is, however, simply intended to signify that such laws have not their original in writing: thence it has been extended in its application by some to those statutes of which there are no records that are pleadable in our courts, that is to say, such as were before the time of memory, or the reign of Richard I.: likewise those parts of the civil and canon law which have been only adopted by us, and not originally enacted here, have been comprehended under the same appellation.

Dugd. Orig. Jur. c. 3.

Hale's Hist. Com. Law, c. 1.

The common law was not of less force on account of its not being committed to writing, for, as Fleta observes, "Leges autem Anglicanas, licet non scriptas, leges appellari non est absurdum, cum hoc ipsum lex sit, quod principi placet, et legis habet vigorem; eas scilicet, quas super dubiis in concilio diffiniendis, Procerum quidem consilio, et principis auctoritate accordante vel antecedente constat esse promulgatas; si enim ob solum scripturæ defectum, leges minime conferentur, majoris proculdubio auctoritatis robur ipsis legibus videretur accommodare scriptura, quam decernentis æquitas aut ratio statuentis." The distinction between the *lex scripta* and *lex non scripta* was also observed in the Roman law; but Bracton seems to think, that at the time he wrote, the common or unwritten law was peculiar to this country, which may possibly have been the case, since the whole law of England at that period, with the exception of Magna Charta, was unwritten law, but the code of the Roman law, which was a written code, was in use in every other country of Europe.

Flet. Proem.

1 Just. l. 1. t. 2. s. 9.

Bract. l. 1. c. 1.

By the civil law is to be understood the civil and municipal law of the Roman empire, which, owing to particular

Civil law.

INTROD. circumstances, was first partially admitted into this country, and finally established so as to form a branch of our jurisprudence. It consists of the Institutes, containing the elements of the Roman law, in four books; the Pandects or Digests, containing the opinions and writings of eminent lawyers, systematically digested in fifty books; a new Code or Collection of Imperial Constitutions, in twelve books, containing the decrees of the emperors who succeeded Theodosius; and lastly, the Novellæ, or New Constitutions, posterior to the former, and forming a supplement to the code.

Canon law.

Ayliffe's Pref. Corp. Jur. Can.

The canon law is a body of ecclesiastical law, originally compiled from the decrees of councils, bulls, and decretal epistles of the Holy See, and the opinions of the ancient fathers, which were digested by Gratian, under the title of Decretum Gratiani: to these were added, the Decretalia of Gregory IX., the Sextus Decretalium of Boniface VIII., the Extravagantes of John XXII., and the Extravagantes Communes of later papers; comprizing the whole *corpus juris canonici*. Some parts of this law were adopted at an early period by the Saxons, but by far the greater part was introduced at the same time with the civil law, as will be more particularly noticed in its proper place.

Statute law.

The statute law is the last branch of law which enters into the composition of English jurisprudence. A statute is any act of the legislature which serves as a rule for the conduct of the community, in which sense all the public acts or laws of the Saxon kings were statutes; but in a restricted sense, a statute signifies any thing which was *statutum*, decreed, or determined by the King's Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in parliament assembled.

Statutes are either declaratory or confirmatory of the common law, or they serve to abridge or enlarge the common law, or altogether to introduce a new law. Most of the old acts, such as Magna Charta, the statute of Marlbridge, Merton, &c., are for the most part confirmatory of

Co. 2 Inst. passim.

the common law, and on that account the more valuable, because they thereby serve to prevent good laws and customs from falling into desuetude. Modern statutes, on the other hand, are for the most part introductory of some new law or regulation; and, being framed with a view to diminish as much as possible the discretionary power of those by whom they are administered, they are remarkable for their number, their prolixity, and oftentimes for their incorrectness and want of clearness.

Such is the composition of our laws, which, considering the gradual manner in which the most important parts of them have grown up amongst us, and the number of learned men who have employed their talents in administering and expounding them, may justify the assertion of Fortescue, "that they are not only good, but the very best." Their mixed character is to be ascribed to the diversity of people who have inhabited this island, each of whom have contributed more or less towards their formation; for, as the writer above quoted observes, "the realm of England was first inhabited by the Britons; afterwards it was ruled and civilized under the government of the Romans; then the Britons prevailed again. Next it was possessed by the Saxons, who changed the name of Britain into England. After the Saxons the Danes lorded it over us; and then the Saxons prevailed a second time; at last the Normans came in, whose descendants retain the kingdom to this day." During all these several changes, although the general frame of the laws has been preserved, yet such additions have been made from time to time as have tended much to its improvement. Our laws (says Bacon) are as mixed as our language, and as our language is so much the richer, the laws are the more complete.

Fort. de Laud. Leg Ang. c. 17.

Proposals for a digest.

CHAPTER I.

THE SAXONS.

Saxon Lawgivers.—Saxon Laws.—Condition of the People.—State of Landed Property.—Thainland.—Origin of the Feudal System.—Bockland.—Folkland.—Descents.—Alienation.—Testaments.—Methods of Conveyance.

CHAP. I. SAXONS.

The common law is of such antiquity, that it was coeval with the first peopling of Great Britain. From the earliest records of the Saxon times may be traced many of the rules and principles of law which are acknowledged in the present day; as the jurisdiction and proceedings of courts, the distribution of powers and offices among the ministers of justice, and the like. Among the Saxon kings there was a series of lawgivers whose codes, then occasionally distinguished by the name of domboes, are still extant, and present us with the outlines of that scheme of English jurisprudence which afterwards obtained a footing. These codes contain little more than a brief abstract of laws, or general rules, for the guidance of the judges or magistrates, the details being left to be decided either by their discretion, or by the known customs of the place.

LL. Wiht. & Edw. Sen. apud Wilk. 48.

Saxon lawgivers.

The first of these codes, which is also said to be the oldest in Europe, was that of Ethelbert, who began to reign A.D. 561; his was followed by the codes of Hlothaire, Edric, and Wihtred, all kings of Kent, and of Ina, king of the West Saxons; after which we have the laws of Alfred the Great, Edward the Elder (his son), Athelstan, Edmund, Edgar, Ethelred, Canute, and Edward the Confessor. Alfred, the most celebrated of the Saxon legislators, not only embodied the laws of his country into a regular form, but did more than any other king towards their observance.

By the wisdom of his regulations and political institutions he acquired the title of Conditor Legum Anglicanarum, as did Edward the Confessor acquire that of Restitutor Legum Anglicanarum, on account of the completeness of the collection which he formed of all the laws then in force throughout England.

Ran. Cest. l. 1. c. 50. Lib. Ramens, sec. 5; Gemiticen. l. 6. c. 9.

It is worthy of observation, that all the Saxon lawgivers showed great wisdom in the business of legislation, by admitting no laws into their selections but what were adapted to the temper and manners of their subjects, being for the most part taken from people that were nearly allied to themselves. The same caution was observed by the Danish king Canute, throughout whose code there reigns a perfect uniformity of language and spirit with those of his predecessors, insomuch, that the collection of Edward the Confessor professes to give, under the general name of Saxon laws, the three several codes which were there distinguished by the particular names of the Saxon-lage, or the laws of the Saxons; the Dane-lage, or the laws of the Danes; and the Merchen-lage, or the laws enacted either by Mercia, the first queen of Mercia, or by Offa, king of Mercia; all which differed from each other no more than the customs of one country, or district, might differ from those of another.

Spelm. Gloss. in Voc. Lex.

LL. Edw. Conf. c. 35. Dugd. Orig. Jur. c. 4.

Some of the laws above-mentioned were collected and published in one volume, folio, in the Saxon language, with a Latin version by Mr. Lambard, in the time of Queen Elizabeth, under the title of Archaionomia. Dr. Wilkins has enlarged this collection in his work, entitled, Leges Anglo Saxonicæ, containing all the Saxon laws extant, together with those ascribed to Edward the Confessor, in Latin; as also those of William the Conqueror, in Norman and Latin; and of Henry I., Stephen, and Henry II., in Latin.

Saxon laws.

In presenting the reader with a view of the Saxon laws, which serve as the basis of the common law, they may be considered under the following heads: namely, the condition of the people, and the state of landed property; the divisions of the country, the ecclesiastical and military states, the criminal law, and the administration of justice.

CHAP. I.

SAXONS.

Condition of the people.

The Saxon people were divided into freemen and slaves. The freemen were again divided into *eorls* or earls, *thanes* and *ceorls* or husbandmen. The eorls were civil officers superior in dignity to the thanes, as appears from the different heriots required from them by a law of Canute. The heriot of the earl was eight horses, that of the thane four horses, besides other things in proportion. The thanes were properly the feudal lords or nobles, so called from the Saxon *thenian*, to serve, because they were bound to do special service for their lords and attend upon the king when required. They were distinguished into the *thani majores*, in Saxon properly *thegen*, who were immediately in the service of the king, and the *thani minores*, in Saxon *theoden*, who were in the service of the higher thanes. The ceorls were the farmers or husbandmen, to whom the cultivation of the land was assigned. The slaves were either domestic slaves, who performed the various offices of the house in the families of their master, or they were employed in the labours of the field, and were on that account called *villani* villeins, because they lived in the vills or villages. These slaves or villeins were in the lowest state of degradation, being considered as the property of their owners. In the laws of Wales it is expressly said, that the master had the same right to his slaves as to his cattle. There was another description of persons, namely, the *frilazin* or freedmen, who had been emancipated from their bondage; but their condition was very little better than that of the villeins.

LL. Can. c. 69. Jud. Civ. Lond. apud Wilk. 71, Spelm. Feuds & Ten. c. 5.

Spelm. in Voc.

State of landed property.

Whether the landed property of the Saxons was subject to the feudal laws, and to what extent, has been a matter of much controversy, which, owing to the scanty information to be gathered from the records of those times, can never be positively decided. The legal historian must, therefore, content himself with stating authentic facts, and leave the reader to draw his own conclusion.

Spelm. Orig. of Feuds, c. 5.

Thainland.

The lands of the Saxons were divided into thainland, bockland, and folkland. Thainland was that which was granted by the Saxon kings to their thains, or thanes, who were properly such as attended at court, and held their land

immediately of the king, the term thane being, as before observed, in the first instance, a title of office, although it afterwards became one of dignity: of these lands the thanes reserved a portion for the support of their household, called inlands, which were cultivated by their villeins; the rest, called outlands, they let out to the ceorls for a certain rent, and in all probability for the same sort of services as were required of the thanes from the king. The thanelands were distinguished by the name of baronies, and other appellations after the conquest.

Spelm. c. 25.

When lands held by the thanes reverted to the crown, it appears they were called revelands, because they fell immediately under the immediate government of the king's officer, the reve, or sheriff.

Spelm. Feuds, c. 24.

The lands of the thanes were subject to three kinds of services, termed the *trinoda necessitas*, namely, the attendance on the king in his military expeditions, the repairing of castles, and the building of bridges, which were all of a feudal character. In the king's grants and conveyances of land among the Saxons, these three things, which, as the name imports, were of the first necessity, will be found expressly excepted from all other immunities. To these must be added a fourth obligation to which they were liable, namely, the heriot, as it was then and has since been called. This consisted in the horses and arms of the thanes, which, at their death, were given to the king as lord, and was proportioned to the rank of the party. It should also seem that a similar gift was made to the thanes by their tenants. This word heriot, in Saxon *heregeat*, is derived from *here* an army, and *geat* an expedition, or *geat*, *geld* money, signifying in both cases a military contribution.

Spelm. Feuds & Ten. c. 8.

Leg. Can. c. 63.

Du Cange ad Voc.

The lands of the Saxons were likewise so far bound by military tenure, that if a man fled from battle his lands were to escheat to the lord, who gave them to him, and if he had hereditary lands, they were to be forfeited to the king. Thus we see that some of the feudal principles were recognized and acted upon among the Saxons. The kings of this realm were considered

Leg. Can. c. 75. Spelm. Feuds, c. 23.

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as having originally had all the lands in demesne, and that, reserving the royalties or grand manors for their own use, they parcelled out the remainder among their thanes, annexing at the same time to these grants the condition of military service, as far at least as regarded the defence of the realm. The thanes in like manner granted out parcels of their lands to inferior tenants, reserving to themselves returns of corn, cattle, or money. Other and more rigorous services, such as wardship, marriage, reliefs, and the like, which constituted the tenures of after times, gradually sprung up in different countries in Europe. It is, however, most probable that, at the period we are now treating of, the feudal system, among the Saxons at least, if not elsewhere, was in its original and simple state.

Spelm. Gloss. ad Voc. *Thainus.*

Spelm. Feuds & Ten. c. 12, *et seq.*

As to the word feud, in the Latin of the middle ages *feodum* or *feudum*, it is not to be met with before the ninth century, in a constitution in the reign of Charles the First, requiring military attendance of his vassals on pain of forfeiting their *feudum* or fee. The derivation of this word is variously given by different writers, some deriving it from *fides*, fidelity, because fealty or fidelity is required from the possessors of feuds; others from *fee*, in German *vieh*, cattle, and *od*, *ohd*, or *vod*, signifying as much as substance or property, because land and cattle are the most substantial kinds of property; others, with still greater reason, derive it from the Teutonic *fehde*, which, like the Danish *feide*, and the English feud, a quarrel, signify war or hostility, because military service is the main obligation attached to feuds. But whatever may be the derivation of the word, there can be no doubt but that such grants of land were all made on condition of a return in military service.

Du Cange, in Voc.

Origin of the feudal system.

The origin of the feudal system is commonly traced from the Lombards and other northern nations, who, on the decline of the empire, made irruptions into different parts of Europe, and obtained from their kings or leaders allotments of land in the countries where they settled, which the possessors again parcelled out into smaller allotments to their inferiors. This practice of granting lands on condition of

Murator. Antiq. Ital. Diss. 10. 547.

military service appears to have been adopted by the Roman emperors; for we learn from Lampridius, that Alexander Severus gave to the officers and soldiers stationed on the frontiers the lands that were taken from the enemy, to be theirs on condition that they and their heirs should do military service; and Probus made similar grants to the veterans in Isauria, requiring that their sons, from the age of eighteen and upwards, should serve in the army. These barbarous tribes were, therefore, rather the imitators than the introducers of a practice, which suited well with their circumstances as the settlers in a new country.

Lamprid. Vit. Sever.

Seld. Tit. of Hon. c. 1. s. 23. Duck de Us. Jur. Civ. l. 1. c. 6.

That the manners and customs of the northern tribes were favourable to the reception of such a system is evident from the account given by Tacitus of the ancient Germans, who he says were in the habit of letting their lands by the year to certain individuals in each tribe, while the rest were engaged in warfare. Besides, the German princes had their followers or attendants, styled comites, who were near the person, shared in all the dangers of the battle, and bound themselves by an oath to defend him and his honour in all things. Nothing, therefore, was more natural than for the princes to bind these comites more closely to themselves by allotting to them portions of the conquered countries on the express condition of military service, and thus secure a number of warriors, who were always ready to defend their newly acquired possessions. Thus did all the landed property of Europe become more or less subject to the feudal laws, with the exception of some few portions that remained free from all service, being holden of no superior. These were called allodial, from *a*, privative, and *lode* or *leude*, a vassal, that is, without vassalage. It is, however, supposed, that there were no lands among the Saxons that were strictly allodial; and, on the other hand, that probably none were burdened with such rigorous services as existed in other countries.

Cæs. de Bell. Gal. lib. 6. c. 21. Tac. de Mor. Ger. c. 26. Spelm. Feuds & Ten. c. 2. Cruise on Real Property, c. 1. s. 15.

Spelm. Gloss. Du Cange Gloss. ad. Voc.

Bockland.

Bockland or bookland, the next species of landed property among the Saxons, was that which was held by charter or deed, and answered to what was afterwards called free-

Spelm. Feuds & Ten. c. 5.

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hold. This was occupied by the ceorls, who were the free or socage tenants of the thanes.

Folkland.

Folkland, in Latin *terra popularis*, the last species of landed property, was holden at the will of the lord without any deed, and mostly occupied by the degraded class of men, the villeins before mentioned. From this last sort of estate sprung, as we shall see hereafter, what has since been termed copyhold land.

Spelm. Feuds ubi supra.

Descents.

The lands of the Saxons descended for the most part equally to all the males, without any right of primogeniture, of which the custom of gavelkind in Kent is still a vestige. The same was the case if they were all daughters; but if there were sons and daughters, it is probable that, after the manner of the Saxons on the continent, they did not share alike. By the laws of Wales a daughter received but half a son's portion.

Lindenb. Cod. Antiq. 476.

Alienation.

Alienation was, by a law of Alfred, so far restricted, that no one could dispose of inheritable property contrary to the will of the original purchaser. Testaments were not in use among the ancient Germans, but probably came into use soon after the introduction of Christianity, for we read of testaments as early as the reign of Alfred. In the form and manner of making wills, as also in the mode of disposing of lands and goods, the Saxons appear to have observed the rules of the civil law. Æthelwolf, in imitation of Charlemagne, divided his lands by will between his three sons; and Alfred, his youngest son, did the same, as appears from his will, which is still extant.

LL. Alf. c. 37.

Testaments.

Tac. de Germ. c. 20.

Hicks' Diss. 51.

The Roman law required seven witnesses to a will, and in some Saxon wills we find even more. Also by the novel constitution of Theodosius and Valentinian, a man and his wife might be joined together in a will; and after this model it appears that a will was made by Byrhtric, a thane, in the reign of Æthelred, in which his wife Ælfswitha is joined with him. As among the Romans, the *rectores provinciarum* had the cognizance of wills: this office among the Saxons devolved on the earls of counties, who took their place. So likewise in the place of the Roman *defensores*

Hicks' Diss. 56.

Spelm. Orig. of Wills, 129.

plebis, or magistrates of ordinary towns, the thane or lord of the town or manor had that privilege, which is enjoyed in some places even to this day. For the most part, however, the Saxons followed their ancestors on the continent in this particular, and gave the charge of wills to the clergy. By a law of Reccardus, king of the Western Goths, the manner of making wills was to be after the civil law; but they were to be published by the priest; and afterwards it was ordained that they were to be published by the earl as well as the priest. So among the Saxons, Elfric, who lived before A.D. 960, published his will before Odo, archbishop of Canterbury; and Byrhtric and his wife did the same before Elfstane, bishop of Rochester. By a law of Alfred it was required that the will should be published in the presence of the king, or bishop, who sat in his place in the county court.

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Spelm. Orig. of Wills, 130.

LL. Alf. c. 37.

It is also evident that there were no executors, but that the county court, where the will was proved, acted as the Roman prætor in some cases formerly did in the behalf of the heir; wherefore in some wills we find the testator begged all the wise men, clergy as well as laity, to see that his will was observed. In some cases the gerefa or reeve of the town performed the same office, and in other cases the lord of the manor.

Hicks' Diss. 57.

Methods of conveyance.

A legal transfer of lands might be made among the Saxons without any deed or writing, but in lieu thereof by certain ceremonies, as that of holding by the horn, by the arrow, and the like. Thus Edward the Confessor granted to the monks of St. Edmund's Bury in Suffolk the manor of *Brok per cultellum*. Nevertheless deeds were not altogether unknown to the Saxons, by whom they were generally denominated *gewrite*, writings. The particular deed by which an estate was conveyed was termed a *land-boc*, whence the land was denominated boc-land. For the ratification of deeds it was usual to have them read in the county court in the presence of the assembly, by whom it was attested by the signature of their names, as well as that of the parties.

Ingulph. Hist. Croyl. 901.

Mad. Form. 283.

Hicks' Diss. 29.

CHAPTER II.

THE SAXONS.

Divisions of the Country.—Counties.—Earl.—Hundreds.—Hundredary.—Tithings.—Friburg.—Tithingman.—Ecclesiastical State.—The Power of the Romish See not recognised.—Introduction of the Canon Law.—Union of the Secular and Ecclesiastical Power.—Deans.—Synods.—Tithes.—Military State.

CHAP. II. SAXONS.

HAVING in the preceding chapter shown what was the state of the law as regards landed property, the next thing to be considered is the division of the country.

Divisions of the Country.

Ingulph. Hist. Croyl. 495; Gul. Malms. de Gest. Reg. Angl. 24.

Counties.

Among the regulations ascribed to Alfred for the establishment of order and good government, was that of dividing England into counties, and these into hundreds and tithings. But although the merit of the invention is commonly given to this great prince, it appears that some of these divisions existed before his time, and that to him belongs the honour of having reduced them to order, and rendered them subservient to the purposes of police. The county had existed in France under the name of *comté* at an early period, and was so called from the *comté, comes*, or earl, by whom it was governed. The comes was an officer of great antiquity in the Roman empire, so named, *à comitando*, from their attending the emperors, because they were always attached to their persons, and were in their immediate service. When Alfred the Great had got rid of his enemies, he set about new modelling the kingdom, and divided it into more regular and uniform portions, to which he gave the name of *scyre*, shire, from *icyran*, to divide, signifying literally a division. The officer to whom the

government of the shire was entrusted was sometimes called an alderman, more properly an earl, which, from the Danish *yarl*, signified a man or a retainer, or as some think from *er*, honour, signified a dignity. The earl, as respected his office, corresponded altogether with the comes of the Latin, and the comté of the French. He had both a civil and military administration of the county, and acted like the comes, both as a judge and a commander of the forces. In his judicial capacity, he was probably styled *aldermann*, and in his military capacity he had the title of *heretoch*, from *here*, an army, and *tohen*, to lead, answering to the Latin *dux*, and the French *duc*.

Earl.

Asser. Vit. Alf. Alcuin. in Epist. 35.

At first the earls had their appointment from the king, and held their office at his pleasure; but from the increasing power of these earls or dukes, and the tacit consent of the sovereign, this office became in process of time hereditary, and sometimes elective, if we may believe the laws ascribed to Edward the Confessor. Among the perquisites enjoyed by the earl was that of the *tertium denarium*, or a third of the profits of fines and penalties imposed at the county court.

Annal. Sax. 49. Spelm. Concil. I. 190. LL. Edw. Conf. c. 33. apud Wilk. LL. Angl. Sax.

The hundred, which was a subdivision of the shire, was a name of number, and was at first probably applied to the number of a hundred families or villages. The hundred is mentioned by name in the laws of Ina, and had been introduced into France as early as the reign of Clotaire, under the name of *centena*, for the express purpose of making such district answer the purposes of civil government. Traces of this institution are also to be found among the ancient Germans. Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur, et quod primo numerus fuit, jam nomen et honor est. The chief man of the hundred was called *centenarius* among the Franks and other nations on the continent, and *hundredarius* or *aldermannus hundredi*, among the Saxons. This officer had likewise both a civil and military duty.

Hundreds.

Spelm. Gloss. in Voc.

Du Cange, Gloss. in Voc.

Tac. Germ. c. 6.

Hundredary.

The tithing was a subdivision of the hundred, and, as its name imports, was the tenth part of a hundred. This di-

Tithings.

Spelm. Gloss. Du Cange, Gloss.

vision is also mentioned in the laws of Ina, but it does not appear that it was connected with the police of the kingdom until the time of Alfred, who, for the prevention of robberies and other offences, required every member of the tithing to be answerable for the good conduct of the rest. So far then as regards the constitution and object of this regulation, Alfred is justly entitled to the praise of being the inventor. This community was called in the Saxon *friborg*, or *friburg*, that is to say, frank-pledge, from *freo*, free, and *borg*, a pledge, because every free man was a pledge or security for the good conduct of the others. The head man of the tithing was called *friborgsheofod*, *or borghealder*, that is, the elder of the borgh; also sometimes *theothungman*, that is, the tithing-man, which afterwards became the common appellation. In Latin the tithing was called *decenna* or *decima*, the members *decennarii*, and the head man *decanus friborgi*.

Dugd. Orig. Juf. 23.

Friburg or frank-pledge.

LL. Edw. Conf. c. 32.

Tithing-man.

The tithing-man had more particularly to answer for the good conduct of the rest; for when any one of the tithing fled on account of any offence, it was his business to assemble the others, and to use all possible diligence to produce the offender. If he were not forthcoming, and the tithing could not purge themselves, they were subject to be fined. In order to support this regulation, every one was obliged at the age of twelve to enrol themselves of some decennary or tithing, at which period he took an oath to be true and faithful to the king. This oath was afterwards called the oath of allegiance; and the proceeding of administering the oath and examining the state of the decennaries, which took place once a-year, was denominated *visus franci plegii*, or view of frank pledge.

LL. Edw. ubi *supra.*

LL. Edg. c. 6; LL. Can. c. 19; LL. Ed. Conf. c. 32.

This pledging also extended to strangers; so that if any one took a stranger in, and suffered him to stay there three nights, and the stranger committed any crime, the person so harbouring him was considered as having made himself a pledge for him. The person who was entertained for one night was denominated in the Saxon *uncuth*, that

LL. Can. c. 25.

LL. Edw. Conf. c. 27.

is unknown; on the second night *twanight gest*, and on the third night *agenhinc*, that is as much as to signify an inmate.

Although the tithing is now fallen into disuse, yet the names of tithingman and headborough are still retained to denote the office of petty constable.

LL. Edw. Conf. c. 34.

Beside these divisions, there were also trithings, which consisted of three or four hundreds, and were otherwise called lathes in Kent, and rapes in Sussex. The trithing is still the name of a division in Yorkshire, under the corrupted form of riding, and the other divisions are retained in Kent and Sussex under their old names.

LL. Edw. Conf. c. 32.

Spelm. Rem. c. 52.

Ecclesiastical state.

With these political divisions was connected the ecclesiastical state as it was first established in England. The Saxons having embraced Christianity through the ministry of St. Austin and other monks sent by Pope Gregory; the church of England, as to its doctrine and discipline, was framed after the model of the Romish church. Canterbury, where the missionaries were first received, A.D. 596, was the first English see, of which St. Austin was consecrated archbishop the next year. London was raised to a bishop's see, and Mellitus chosen the first bishop in 604; York was raised to an archbishopric, and Paullinus placed at its head in 624; and at the time when the venerable Bede closed his history, we are informed that there were 16 bishops who had their seats at the most important places of that time. Canterbury was always acknowledged to be the metropolitan church of all England, and has continued so ever since, notwithstanding the title to the primacy was disputed by some archbishops of York.

Bed. Hist. l. 1, c. 27, l. 2, c. 4, &c.

The power of the Romish see not recognised.

The interference of the popes in the affairs of the church was not quickly nor suddenly commenced; the Saxons, though a religious people, and attached to the forms of the Romish church, were nevertheless very jealous of any exercise of papal power. The authority of the king was recognised as supreme in the erection, enlargement, or contraction of the sees, as also in the election of the bishops, and other important matters in the government of the church. Of this

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the case of Wilfred, bishop of York, an ambitious and turbulent prelate, furnishes ample testimony. When Egfred, king of Northumberland, thought proper to divide into two parts the see of York, which then comprehended all the counties between the Humber and the Frith of Forth, this was taken so ill by Wilfred, that he appealed to the court of Rome; but, on his return with a decree from the pope for his restoration, he was thrown into prison by order of the king, and was not liberated until after some years confinement.

Bed. Hist. l. 4, c. 12.

Introduction of the canon law.

At the same time, the Saxons did not reject the interference of the papal see, when there appeared to be any reasonable plea for it; as was evinced on the occasion of introducing the canon law, which was effected during the papacy of Vitalian. This pope, seeing that the Saxon churches were much troubled with dissensions on several points of doctrine and discipline, procured the appointment of one Theodore, an Italian monk of good repute, to the see of Canterbury; who, co-operating with his master, assembled a synod at Hereford, A.D. 673, and set before the bishops the necessity of putting an end to all further divisions, and introducing a uniformity of worship. The prelates concurring in this proposition, he procured their consent, that whatever had been canonically decreed by the fathers should be observed in England, particularly ten articles which more immediately applied to the circumstances of this country, as regarded the time of keeping Easter, and other points.

Spelm. Concil. tom. i. p. 15.

In these concessions, which were too reasonable to be refused, no obedience whatever to the see of Rome was implied, nor were any further advances made by the latter to the attainment of this object until the conquest.

Bed. Ecc. Hist.; Warn. Ecc. Hist. i. p. 1.

Union of the secular and ecclesiastical power.

Between the secular and ecclesiastical powers there was at this period a happy union in England, owing to the piety of the Saxon princes and the moderation of the clergy, who were not yet subject to any foreign influence. To the bishop belonged not only the ecclesiastical government of the diocese, but also a considerable share in the civil admi-

LL. Edg. c. 5; LL. Can. c. 17; Spelm. Rem. 50.

nistration; for the bishop and the earl or alderman co-operated for the preservation of the peace and the maintenance of good order.

Bishop Stillingfleet supposes that there was no other ecclesiastical jurisdiction except that of the bishop; but this does not appear to have been strictly the case. Religious houses obtained, in some cases, the grant of a franchise to which a jurisdiction was annexed. Mention is also made of the archdeacon, who had a power over the inferior clergy, and that he sometimes sat with the alderman in the scyregemot. It is also clear that the deacons or deans had a judicial office; for among the laws of Edward the Confessor it is provided, that of 8*l*. penalty for a breach of the peace, the king was to have 100*s*., the earl 50*s*., and the *decanus episcopi* 10*s*. "As he is," says Bishop Gibson, "there called *decanus episcopi*, so without doubt he was appointed by the bishop to have the inspection of the clergy and people." The deans were afterwards distinguished into *decani urbis*, or such as presided over churches in the city; and *decani vicarii* or *rurales*, rural deans, who presided over churches in the country. In this manner dioceses were divided into archdeaconries and deaneries, or rural chapters, corresponding to the political division of the county into hundreds and tithings.

Stillingf. Cases, vol. i. p. 353.

Deans.

LL. Edw. Conf. c. 31.

Gibs. Cod. 971.

Usage prevailed among the Saxons in ecclesiastical as much as it did in secular affairs; but what required the express sanction of the legislature was determined in councils, synods, or, as they were then called circgemots; which were summoned either by the King's authority or by the archbishops of Canterbury. The first council of any importance among the Saxons was summoned A.D. 664, by Oswi, king of Northumberland, for the purpose of settling the time of keeping Easter, when it was determined that it should be kept after the Roman manner. At a council which was assembled A.D. 747, by Cuthbert, archbishop of Canterbury, at Cloveshoon, in Kent, thirty canons were

Synods.

Bed. Ecc. Hist. l. 3, c. 25.

Spelm. Con. tom i. p. 237-46.

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made; and other councils were held in the time of Alfred the Great, Edgar, Canute, and others, for the purpose of regulating the conduct of the clergy.

Although these synods were called for ecclesiastical purposes, yet the Saxon kings being willing to give the sanction of religion to all their proceedings, and to make the ecclesiastical and temporal estates of the realm co-operate for the general good, used frequently to summon the clergy and laity to the same assembly, where ecclesiastical and secular affairs were treated of indiscriminately, and frequently blended in the same law. In a council called by King Athelstan, A.D. 928, there were present, beside the archbishop of Canterbury and the bishops, several of the nobles and wise men; so likewise the laws of King Edmund were made at a Michel synod, held at London A.D. 944. In these councils we may trace the beginnings of our present parliaments, of which more will be said hereafter.

Tithes.

Among the subjects which engaged the attention of those synods, the payment of tithes was frequently considered. The introduction of tithes into England is probably coeval with that of Christianity. Offa, king of Mercia, having set the example of giving the tenth of his goods to the church, the payment of them is enjoined by most of the subsequent kings whose laws are extant. It should seem that, in the commencement, people might pay their tithes to what priests they pleased, which was called the arbitrary consecration of tithes; or they might put them into the hands of the bishop, to be distributed among the clergy: but, as this practice afforded a facility to fraud and abuse, it was enacted by a law of Edgar, that the payment of tithes should be confined to the parish to which they belong; from which it may be gathered that England was at this time divided into parishes, and is supposed to have been so from the time of Alfred the Great. Besides tithes, there are other church dues mentioned at that time, as *romscot*, which was probably the same as was afterwards called Peter-pence; and *soulscot*, a

Seld. on Tithes, c. 10.

LL. Edg. c. 2; apud Wilk. 76.

LL. Cam. c. 13.

sort of expiatory offering made by a person at his decease to the church for the good of his soul, which was afterwards called a mortuary or corse-present.

Military state.

The military law of the Saxons was similar to that of their German ancestors. All their youth were trained to the use of arms, and every freeman was obliged to be ready to take the field whenever they were called upon so to do. The only persons exempted were the clergy, who, like the priests among the pagans, were prohibited the use of arms; and the slaves, who were not allowed the honour of bearing arms. That the people might always be furnished with the necessary arms, and expert in the use of them, the freemen of each tithing, hundred, and county, were appointed to meet at certain times and places, for the purpose of going through their exercises, and having their arms inspected; besides which, a general review of all the armed men and arms in the kingdom took place on one and the same day of every year, in the month of May. These regulations, in which we may trace the origin of our present militia, are supposed to have been made by Alfred, and to be coeval with the scheme of political economy which he established. The troops of each division were commanded by the officers or headmen of the respective districts, namely, the counties by the heretochs or dukes, the hundreds by the hundredaries, and the tithings by the tithingmen.

Bed. Ecc. Hist. l. 2, c. 13; Spelm. Concil. i. p. 238.

LL. Edw. Conf. c. 35.

CHAPTER III.

THE SAXONS.

Administration of Justice. — Officers of Justice.—Alderman.—Gerefa or Reve.—Courts of Justice.—Folcmote.—Hallmote.—Hundred Gemote.— Scyregemote.— Witenagemote.—Judicial Proceedings.—The Ordeal.—Trial by Compurgators.—Trial by Witnesses.—Trial by Jury.—Suit in a County Court.—Grand Jury.—Law Terms and Vacations.

CHAP. III. SAXONS. *Administration of justice.*

IN the former chapter it has been shown how far the divisions of the country were connected with its civil, ecclesiastical, and military establishments. In treating of the administration of justice, there will be further occasion to point out the utility of these divisions. Under this head may be considered the officers of justice, the courts of justice, and the judicial proceedings.

Officers of justice.

The two principal officers of justice were the alderman and the gerefa.

Alderman. LL. Edw. Conf. c. 35.

The *ealderman*, *ealdorman*, or *alderman*, that is, literally, the elderman, was like the senator of the Romans, so called *non propter ætatem sed propter sapientiam et dignitatem*. He was an officer of distinction, and the next in rank to an atheling or nobleman. He presided with the bishop at the scyregemote, and was a member of the witenagemote. In the early part of the Saxon history he appears to have sometimes headed the forces of the county, and is said to have been the same as the carl; but, subsequently, his office was purely judicial, and after the conquest was executed by the *justitia* or *justitiarius*. He was sometimes styled *cyninges ealdermann*, or the king's alderman, because he was specially appointed by the king to administer justice; wherefore it was a penal offence to quarrel or fight in his house, or in his pre-

Jud. Civ. Lond. apud Wilk. p.71. In Præf. LL. Alur. c. 44, apud Brompt. Sax. Chron. 48, 78.

LL. In. c. 26; LL. Alf. c. 21.

sence. There was likewise an *aldermannus totius Angliæ* (an alderman of all England), *aldermannus comitatus*, *aldermannus hundredorum*, &c. to denote the difference of rank and jurisdiction.

Gerefa or Reve.

The *gerefa*, or reeve as he is called in English, was an officer of justice, inferior in rank to an alderman. He was a ministerial officer, who was appointed to execute process, to keep the king's peace, and to put all the laws into execution. He witnessed all contracts and bargains; brought offenders to justice, and delivered them to punishment; took bail or security of such as were to appear at the scyregemote or county court, and presided at the hundred court and folcmote. If he failed in the execution of his duty, he lost his office and the king's favour. There was a distinction both in the rank and jurisdiction of the gerefa. The shire-gerefa, shire-reve, or sheriff, was probably distinguished by the name of the king's gerefa, because he more immediately executed the king's precepts, and sometimes sat in the place of the alderman in the county court. He appears also to have been distinguished by the title of the *heh-gerefa*, or high-sheriff. The gerefa who acted in the tithing was named a tithing-reeve; he who acted in the *byrig* or burgh, a borough-reeve; and he who acted in towns, the tun-gerefa.

LL. Wiht. apud Wilk. 12. Jud. Civ. Lond. apud Wilk. 69. Ibid. 65.

LL. Alf. c. 30; LL. Edw. c. 11.

Jud. Civ. Lond. apud Wilk. 69.

The gerefa was an officer of great antiquity, and known by that or a corresponding name in most countries of Europe. He was called in the Danish, *gräve;* Swedish, *grefve;* Teutonic, *grefe;* German, *graf;* and the Latin of the middle ages, *graphio* or *grafio*. Adelung observes, that the twelve judges appointed by Odin in Scandinavia were called greve. Both the officer and the name have, with some variations, been retained in Germany. The *graf* of the Germans signifies, for the most part, a title of dignity, answering to the count of the French, and the earl of the English; and in some cases, also, the title of a prince, as the landgrave, or marcgrave. It is also in some cases still used to denote a judicial office. The *gerefa* of the Saxons was changed, as

Lindenbrog Cod. Antiq. Lex. Sal. tit. 34; Du Cange, Gloss. in Voc. Adelung. Wörterb. in Voc. Graf.

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to the name, into the English greve or reve, but the office remained nearly the same.

Courts of justice.

The courts of justice among the Saxons were modelled, according to the divisions of the kingdom, into counties, hundreds, and tithings. The Saxons, in imitation of their German ancestors, did, as Tacitus informs us, "jura per pagos et vicos reddere," distribute justice in every town and village, so as to afford to every man an opportunity of having redress of injuries within his own district in an easy and expeditious manner. Alfred, who did most towards the erection of these tribunals, had doubtless an eye to that part of the Mosaic institution, where it is said that *tribuni, centuriones, et decani judicabunt plebem omni tempore.*

Tacit.Germ. c. 12.

Folcmote.

The lowest of these tribunals, in point of jurisdiction, was denominated a *folcmote*, from the words *folc*, people, and *mote* or *gemote*, a meeting or court; that is, literally, an assembly of the people or inhabitants of any tithing or town, who were summoned by a bell, called a mote-bell. This was in the nature of a tithing court, at which the tithing man, or *tienheofod*, as he is sometimes called, presided, and settled all small disputes between the neighbours, as matters of trespass in meadows, corn, and the like. But the name of folcmote was applied generally to all courts that were adapted to the convenience of the people within any district; thus the hundred court was frequently called by the same name.

LL. Edw. Conf. c. 35.

Spelm. Rem. 50.

Halmote.

The *halmote* was the lord's court, so called from *hal*, the hall, where the lord's tenants or freemen met, and justice was administered. This court, which was granted to the thanes as a franchise, had a civil and criminal jurisdiction, denoted by the words *sac*, *soc*, *tol*, *team*, *infangthefe*, and *outfangthefe*; terms which, though barbarous in sound, were very expressive of the meaning they were intended to convey. Thus *sac*, from *sac* a cause, signified the privilege of hearing and determining civil suits; *soc*, in the sense of a liberty, denoted the lord's privilege of having suit of court from his

LL. Edw. Conf. c. 21, et seq.

tenants; *tol*, was the privilege of having toll or custom from those who came to buy or sell within the manor; *team*, signifying a race or generation, was the privilege of having a race of villeins; *infangthefe*, was the privilege of trying thefts within the manor; and *outfangthefe*, the privilege of trying thefts committed by strangers within the lord's jurisdiction. This, though a part of the feudal system, in which a jurisdiction was annexed to a grant of land, was also a practice among the ancient Germans. "In more fuit," says Tacitus, "ut unusquisque agricolis suis jus diceret." When causes arose which concerned persons in different seigniories, they were carried to the next superior court, namely, the hundred court. This court was called after the conquest a court-baron, as to its civil jurisdiction; and a court-leet, as to its criminal jurisdiction.

Hist. Ingulph. 75, et seq.

Hundred gemote.

The *hundred gemote*, or court of the hundred, was, as its name imports, a court held, for the benefit of the inhabitants of the hundred, every month; at which the alderman, but more frequently the gerefa, presided, and all who were summoned were obliged to attend, in pain of being heavily mulcted. The hundred court was called a *wapentake* in the northern counties; from the Saxon *wapen*, arms, and *tac*, a touch; because, when the chief of the hundred entered upon his office, he appeared in the field on a certain day on horseback, with a pike in his hand, and all the principal men met him there with lances; when, he alighting, they touched his pike with their lances, as a token of submission to his authority. In this court causes of great moment were heard and determined, as Mr. Dugdale has shown from several records; besides which, it took cognizance of theft, trials by ordeal, view of the frankpledge, and the like. Whence, after the conquest, this court was called the sheriff's tourn, and, as regarded the examination of the pledges, the court of the view of frankpledge. When this court was held in towns, it was called burghmote, which was held three times a year, and at which the alderman presided.

LL. Inæ apud Spelm. Gloss. in Voc.; Dug. Orig. Jur. 26; LL. Ethel. c. 20; LL. Edw. Conf. c. 3.

Dug. Orig. Jur. 27.

LL. Edg. c. 5.

Scyregemote.

The *scyregemote*, that is, literally, the mote or court of

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the shire, in Latin *curia comitatus*, was the principal court among the Saxons, which was held twice a-year for the determining all causes, both ecclesiastical and secular; the former of which were heard and determined before the bishop, and the latter before the alderman. Appeals were made from the hundred court to the county court.

LL. Edg. c. 5. LL. Can. c. 17. Dugd. Orig. Jur. 28. *Witenagemote.* Sax. Chron. passim.

The last and supreme court in the kingdom was that which was held in the king's *aula* or palace, in which the Saxon kings administered justice in person. This was a court of appeal, where the sentences of inferior judges were reversed or confirmed. Alfred the Great, as we are informed, by his biographer, sometimes spent whole nights, as well as days, in hearing appeal causes; and frequently reprimanded the judges when he found them to have been guilty of ignorance or neglect. It is supposed by some that this court was called *witenagemote*, that is, the court of *witen*, the wise men who were learned in the law; but the term witenagemote is also applied to the national councils, afterwards called parliaments, of which more will be said hereafter.

Asser. Vit. Alf. 19, 20.

Reeves's Hist. i. 7.

Of the officers belonging to the supreme court, there are but two mentioned at this period, namely, the alderman of all England and the chancellor. The alderman of all England was an officer of the highest dignity and authority next to the king; insomuch that those who held it received the title of *healfcyning*, that is, half-king. Athelstan, a great thane in the reign of Athelstan, is the first spoken of as the alderman of all England. His sons Æthelwold and Aylwic succeeded him in that office. The chancellor was sometimes called a scribe or notary, in the Saxon *boceras*, and is described as an officer of great trust and confidence. Ingulphus speaks of Turquetil, who filled this office under Edward the Elder, and his successors Athelstan, Edmund, and Edred. He is represented to have been "*consiliarius primus præcipuus et secretis familiarissimus.*" The first person of whom there is any notice who filled that office among the Saxons was Unwona, in the reign of Offa, king of Mercia.

Lib. Ramens, s. 49.

Ingulph. Hist. 512; Hick's Thesaur. ii. 46.

Dug. Orig. Jur. 33.

As the practice of appealing grew burdensome, some

restriction was put upon it by a law of Edgar, which forbad any one appealing to the king, unless he was denied justice at home. This law was confirmed by one of Canute.

LL. Edg. c. 2; LL. Can. c. 16.

Judicial proceedings.

The judicial proceedings among the Saxons were as simple as the manners of the age. There are three kinds of trial of which express mention is made; namely, the trial by the ordeal, by compurgators, and by witnesses.

The ordeal.

The ordeal, from the Saxon *ordel* a judgment or determination, signified by distinction that judgment which was passed upon the guilt or innocence of a person by an appeal to heaven, wherefore it was also called *judicium Dei.* This mode of trial was universally prevalent among the Saxons, Lombards, Franks, Alemanni, and other northern tribes that occupied Europe, and was no doubt immediately derived from their ancestors the Germans, who, as Tacitus informs us, were much addicted to divination. But this relict of superstition was not confined to the northern tribes, for we find express allusion to a similar custom among the Greeks and Romans. The ordeal was performed in different ways: the principal of which, as used by the Saxons in England, were those by fire and water; the former for persons of free condition, and the latter for vileins. The fire ordeal was performed by walking barefoot over a certain number of burning ploughshares, as Queen Emma, the mother of Edward the Confessor, is said to have done; or by carrying a bar of red-hot iron in the hand for a certain distance. According as the accused party came off unhurt or otherwise, he or she was declared innocent or guilty. In order to give all possible solemnity to the trial, the accused were obliged for some days previous to perform various religious duties, such as fasting, prayer, ablutions, and the like, preparatory to the ceremony.

Tacit. Ger. c. 10.

Sophoc. Antig. v. 264; Virg. Æn. l. 11, v. 787. Glanv. l. 14, c. 4.

Rudborne, Hist. Wint. l. 4, c. 1.

LL Can. c. 13; LL. Edw. Conf. c. 9; LL. Athelst. ap. Brompt.

The water ordeal was performed either in cold or hot water. In the former case the accused was stripped naked, bound hand and foot, and a rope tied round his body, when he was thrown into a pool; and if he floated he was pronounced guilty, but if he sunk he was acquitted, and drawn out immediately. In performing the hot-water ordeal, the accused

Du Cange Gloss. in Voc. Aqua.

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party was to plunge his or her hand into boiling water up to the wrist if the accusation was *simplex*, that is, the crime was not heinous; and up to the elbow if the accusation was *triplex*, that is, the crime was heinous.

LL. Inæ. c. 77; LL. Athelst. c. 6, 7.

There was another species of ordeal in use among the Saxons called *corsned*, from the Saxon *cors*, accursed, and *sned*, a cake or piece of bread. This was performed by eating a piece of bread over which the priest pronounced a certain imprecation; and if the accused ate it freely he was pronounced innocent, but if it stuck in his throat it was considered as a proof of his guilt. Sometimes the eucharist was used in lieu of common bread.

Trial by compurgators.

The trial by compurgators was *per sacramentum vel juramentum*, that is, by the oath of the party himself, confirmed by the oaths of his neighbours. The manner of conducting this trial was as follows: The party accused of any crime was obliged to bring a certain number of persons, as prescribed by law, who laid their hands on the Gospels, or on some relics, and he laid his hand over all the rest. Then he swore by God and all the hands that were under him, that he was not guilty of the crime laid to his charge; and they were supposed by this act to declare, upon their oaths, that they believed he had sworn the truth. Thus a person was said to swear by any given number of hands, according to the number of persons joining in the oath; wherefore *jurare septima manu* signified to swear by six persons besides the accused, and *jurare duodecima manu* to swear by eleven besides the party accused. These persons were mostly called *compurgatores*, because they contributed by their oaths to purge or clear the accused party of the crime laid to his charge, likewise *purgatores*, *sacramentales*, *sacramentarii*, *juratores*, *conjuratores*, &c.

Du Cange Gloss. in Voc. Juramentum.

As to the number of compurgators, the law of the Saxons and other nations varied very much; requiring in some cases not more than one, two, or three, and in others as many as thirty, fifty, or even a hundred. As to the condition of the parties, they were to be the peers or equals of the accused.

Du Cange Gloss. ubi supra; LL. Æthel. c. 15; Fœd. inter Alf. et Guth. apud Wilk. 47.

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In the treaty between Alfred and Guthrum the Dane it is ordained, that if a king's thane was accused of homicide, he was to purge himself by twelve king's thanes. If an inferior thane was accused, he was to purge himself by eleven of his equals and one king's thane. In regard to the qualifications of the compurgators, they were to be *boni et legales*, and such persons as had not been charged with any crime. That none might be admitted to take the oath but such as were competent, they were examined previously by the judges.

Hick's Diss. Epistol. 34, 35; Spelm. Gloss. ad Voc. Jurata.

This mode of trial was denominated *purgatio canonica*, because it was admitted by the canons of the church, in distinction from the ordeal and other modes of trial, which were distinguished by the name of *purgatio vulgaris*, because they were adopted by the secular power. It was afterwards applied to civil matters in actions of debt upon simple contract, when it was called *vadiatio legis*, that is, wager of law. The laws of the Saxons, which required that no contract should be made without witnesses, rendered this mode of proof for the most part unnecessary, but it was perfectly consistent with the manners and institutions of that age, that, in cases where the witnesses were dead, or otherwise unable to attend, they should allow a man of good reputation to clear himself of an unjust demand by his own oath and that of his neighbours.

Reeves's Hist. i. 23, 24.

Trial by witnesses.

As to the trial by witnesses, that was an obvious mode of coming at the truth of a matter, which had been resorted to by all nations at all times, and was much facilitated among the Saxons in civil causes by the law, so often repeated and enforced, requiring witnesses to every bargain.

Wilk. LL. Anglo-Sax. 9, 16.

Trial by jury.

Whether the trial by jury existed among the Saxons has, like many other matters connected with those remote periods, been a subject of controversy. From all the records that have been preserved of those times, it is clear that there was no such thing as a jury of twelve men sworn to give their verdict on the evidence offered to them; but it is also equally clear, that the decision of at least important points was not left to a single judge. An example of a suit or two,

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as it was conducted by the Saxons, may serve to illustrate this matter better than any course of reasoning.

Suit in a county court.

Hicks' Diss. 3.

In a county court held at Agelnothestane, at which presided Athelstan the bishop, and Ranigus the alderman, were present, Edwin the son of the alderman; Thurcilus, surnamed *Albus;* Turfigus, surnamed *Comptus;* and all the *liberi homines* of the county. The cause was between Edwin and his mother Enneawne, concerning a parcel of land. When the case was stated, the bishop desired to know whether any one was present to answer for the mother of Edwin; upon which Thurcilus stepped forward, and declared that he would answer when he was informed of the matter of controversy: then three of the thanes, Leofwin, Ægelsigus, and Thirsigus, who were of the same village as that where the mother of Edwin lived, were commissioned by the court to wait upon her, and learn from her own mouth what right she had to the lands that were claimed by her son. Upon their applying to her she declared, with many expressions of anger towards her son, that he had no right whatever to the lands which he claimed, and added that it was her intention to leave at her death all her lands, gold, garments, and whatever she had, to her kinswoman who was sitting by her side, Leofleda, the wife of Thurcilus, and to disinherit her son. At the same time, she begged them to carry back this message to the court, and to beg all the thanes there present to be witnesses to this her donation. On their return to the court, the thanes communicated the result of their inquiries, when Thurcilus arose, and prayed the court to adjudge these lands to his wife Leofleda, according to the intention of Enneawne the donor. All who were present did as Thurcilus desired; upon which he mounted his horse, and, riding to the monastery of St. Æthelbert, he caused the judgment to be enrolled in the Book of the Gospels.

Hicks' Diss. Epist. 7.

In a suit between Wynfleda and Leofwin, the former appealed to the King Ethelred, and proved by her witnesses, namely, Sigeric the archbishop, Ordbyrht the bishop, Ælfric the alderman, and Ælfthritha the mother of the king, that

Ælfric sold to Wynfleda the land at Haccebburn, and that at Bradenfeld, in the district of Decetta. The king then sent them to Leofwin, to declare to him what the archbishop and the other witnesses testified; but he would not give up his claim until the matter was heard in the county court. Wherefore the king sent his seal (or simply his sign, as Dr. Hicks supposes) by the Abbot Alverc to the court, which was held at Moshlæwa, greeting all the *witen* or wise men there assembled, and commanding them to do right between Wynfleda and Leofwin. Sigeric and Ordbyrht also sent their testimony, which, being read, Wynfleda was desired to set forth her claim. This she did, and moreover supported it by the testimony of many other noble men and women. The court gave judgment in her favour, but declined putting Leofwin to the oath, lest, if he were convicted of perjury, he should be compelled to pay the penalty of that offence, besides making restitution to the complainant.

From the above proceedings it is worthy of observation, that the members of this court, being all thanes, were not called upon to deliver their judgment upon oath, but rather after the manner of peers in parliament, upon their honour. The bishop and alderman presided, by virtue of their office, in the court; but otherwise, being all equals in rank, the distinction was not so marked as, in aftertimes, between a judge and a jury. To the thanes it belonged to determine not only as to the fact, but as to the law. It appears, however, that special regard was had to those who, from their local knowledge, were best able to judge of the matter in question; wherefore three of the thanes, living in the same village as the defendant Enneawne, were commissioned to go to her. No certain number of the thanes were summoned; for by a law of Ethelred, before referred to, all the freeholders of the county were obliged to attend.

Hicks' Diss. Epist. 8.

Ante p. 25.

Law proceedings were then carried on with much less formality than in aftertimes. Each man pleaded his own cause, or got some one to answer for him who was connected by the ties of blood or friendship. So, likewise, where the

Hicks' Diss. Epist. 8.

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defendant could not attend, it appears that, instead of compelling their attendance or allowing them to *essoin*, that is, to excuse themselves, as was afterwards the case, some of the court were sent to the parties, as in the case of the widow Enneawne; which supposes that all the parties were, in their disputes, actuated by a certain principle of honour, that rendered the coercions of the law not so necessary.

For the same or a similar reason, writs were then rarely in use in legal proceedings; the parties being mostly summoned by some officer or messenger in person Thus, in the latter example, the king sent his seal and a message to the court. Dugdale has, however, given one example of the use of a writ in the reign of Ethelred.

Dugd. Orig. Jur. 34.

In all the suits on record at that period, no parties are mentioned of lower condition than that of thanes: it is therefore fair to presume, that if questions were referred to inferior persons for their decision, they must, as in aftertimes, have been bound by an oath. It is, however, far more consistent with the manners of the age to suppose, that questions affecting the lower orders were either decided by the modes of trial then in use, or otherwise settled immediately by the court. A jury, in the modern sense of the word, was doubtless a thing unknown among the Saxons, and probably as little known and practised in other countries of Europe. At the same time it cannot be denied, that the practice of submitting causes to the decision of twelve men was universal among all the northern tribes from the very remotest periods of antiquity. Odin or Woden, the god of the ancient Germans, had twelve judges, who heard and determined all causes; but they were originally appointed by the court, and acted as assessors to the supreme judge. In process of time, however, they were chosen by the parties, and on that account this sort of jury was called by the Danes *nembda*, from *nemen* to name.

Hicks' Diss. Epistol. 37.

Grand jury.

In criminal matters it is clear, from a law of Ethelred, that a grand jury existed among the Saxons; for the law directs that twelve thanes, with the sheriff at their head,

LL. Ethel. c. 5.

should go, and, on their oath, inquire into all offences, not charging any one falsely, nor wilfully suffering any offender to escape. From the condition of the parties, and the office required of them, namely, *accusare*, that is, to make presentment of offenders, it is beyond all question that they had only to determine what offenders should be put upon their trial and what not.

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Among the legal proceedings of the present day which may be traced to our Saxon ancestors, that of terms and vacations must not be forgotten. The introduction of law terms (says Mr. Dugdale) is ascribed by Polydor Virgil, Holingshed, and some later writers, to King William I.; but Sir Henry Spelman has made it appear very clearly that our Saxon and Norman ancestors divided the year between God and the king, calling those days and parts of time which were assigned unto God *Dies Pacis Ecclesiæ*, and the residue *Dies Pacis Regis*. In the league between Edward the Elder and Guthrum the Dane, it was ordained, "Festis diebus omnibus et legitimis jejuniis, ordalium nullus ingreditor, neve ad jusjurandum addicitor." The constitution made at Eanham in the reign of King Ethelred, and another in the reign of Canute, defined the terms more minutely, from which it appears that Hilary term began Octabis Epiphaniæ, that is, the 13th of January, and ended on Saturday immediately preceding Septuagesima, which, being moveable, made this term longer some years than others. Easter term began Octabis Paschæ nine days sooner than it now does, and ended before the vigil of Ascension, that is, six days sooner than at present. Trinity Term began Octabis Pentecostæ, to which, as no period appears to have been fixed by the canon, it was therefore called *Terminus sine Termino*; but it was afterwards fixed by statute in the 51st year of Henry III. that it should end within two or three days after Quindena Sancti Johannis, that is, about the 12th of July. This term was fixed by statute in the 32d year of the reign of Henry VIII. to begin Crastino Sanctæ Trinitatis. Michaelmas

Law terms and vacations.

Dugd. Orig. Jur. 89, et seq.

Spelm. Orig. of Terms.

Reeves' Hist. i. 192.

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Term began on Tuesday next after St. Michael, and was closed by Advent; but, as this is moveable, and may fall upon any day between the 26th of November and the 4th of December, therefore the 28th of November, as a middle period, by reason of the feast and eve of St. Andrew, was appointed.

CHAPTER IV.

THE SAXONS.

Criminal Law.—Penalties for Offences.—The Were.—Murdrum.—Stealing.—Outlaws.—Breach of the Peace.—Pax Regis.—Defamation.—Witnesses to Contracts.—Sanctuary.—Abjuration.—Hue and Cry.

CHAP. IV.

SAXONS.

Criminal law.

THE principles of criminal jurisprudence among the Saxons were remarkable for several peculiarities, arising from the manners and character of the people. The gratification of private revenge, the strongest passion in the breast of an untutored mind, was very prevalent among all the northern tribes, who, forming themselves into families or clans, were bound by particular laws of honour to resent the affronts or injuries offered to any of the members. This principle of retaliation naturally produced violent and deadly feuds, which for a time broke through all the restraints of government. As the Saxons retained this characteristic of their ancestors, their kings adapted the laws to the humour of the people, so as to moderate and regulate their passions rather than attempt to suppress them altogether, which they knew to be impossible. For this reason, we find that they adopted the principle of compensation for every personal injury whatever, even to the taking away of life. In the code of Ethelbert, the first Saxon legislator, there appears to be hardly any other penalty attached to any offence, however heinous. If a man killed another, the slayer was to compensate his death by the payment of a certain sum, greater or less, according to the circumstances of the case. If a man killed his chief guest, his death was to be compensated with eighty shillings, and that of his other guests according to their rank. By the laws of Athelstan, the life

Tac. Germ. c. 20; Lindenbrog. Cod. Antiq. passim.

Penalties for offences.

LL. Ethelb. c. 26; LL. Inæ, c. 70.

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The were.

of every man, not excepting that of the king himself, was estimated at a certain price, which was called the *were*, or *æstimatio capitis*. The were for the life of the king was 30,000 krymras, or about £300 of our money; that for a prince, 15,000; that for a bishop or alderman, 8,000; that for a sheriff, 4,000; that for a thane or priest, 2,000; and that for a ceorl, 260. The price of wounds was also varied according to the nature of the wound, or the member injured. The cutting off an ear was to be compensated by the payment of twelve shillings; clipping it off, six shillings; and striking out an eye, fifty shillings. For a wound an inch long, a shilling was to be paid, and for one of the same size in the face, two shillings. Injuries to a man's cattle and property might be atoned for by similar amends, suited to the circumstances: the penalty for mutilating an ox's horn was ten pence; for that of a cow only two pence. A similar distinction was made between the tail of an ox and that of a cow. Also if a man killed the slave of another, he was obliged to pay the price of a slave, which was called *manbote*, that is, the man's price or value. If a master beat out the eye or teeth of his slave, the latter recovered his freedom; and if he killed him, he paid a fine to the king. If a slave killed a freeman, the owner of the slave was to make amends. On this principle of compensation it appears, that if a man in hewing a tree happened to kill another, the relations were entitled to the tree. The violation of female chastity was also to be compensated in a similar manner, and with similar distinctions as to the rank and condition of the parties; an offence of this kind in the case of the king's maid-servant was compensated with the payment of fifty shillings, and so in the cases of subjects the penalty was proportioned to the rank both of the servant and the master. If a freeman committed adultery with another man's wife, he was to make him amends by buying him another. The ordinary compensation for theft was six shillings; but if committed in a church, the offender was to restore fourfold. If a bishop was robbed, restitution was to be made elevenfold, which was greater

LL. Ethelb. c. 41, et seq. LL. Alf. c. 46, et seq.

LL. Inæ, c. 59, et seq.

LL. Inæ, c. 69.

LL. Alf. c. 20, 17.

Ibid. c. 13.

LL. Ethelb. c. 10, et seq.

LL. Ethelb. c. 32.

than in the case of the king. In this manner was every offence considered in the light of a civil injury, and the object of the laws was to repair the fault rather than to punish the offender. There was, therefore, no distinction made between things done with deliberate malice and those done in the heat of passion or by inadvertence; a kind of lenity which, however admissible in a rude and simple state of society, was soon found to be inadequate to the purposes of good government. Subsequent legislators, therefore, added other penalties, and punished crimes not merely as private injuries, but as public offences. Thus, in the time of Ina, half the were in the case of homicide was paid to the king, in the name of *frith-bote*, or compensation for a breach of the peace; and half to the family of the deceased, which was called *mægbote*, that is, literally, a compensation to the kindred. By a law of Edmund, a homicide was to bear all the consequences of his offence, and his relations to be exempted from all charge, provided they afforded him no protection or sustenance, otherwise they were to be treated as accessories. For the protection of the Danes from the resentment of the English, a law was made by Canute imposing a fine on the hundred, called murdrum, when the slayer was not found.

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LL. Inæ, c. 23.

LL. Edm. apud Wilk. 73.

Murdrum.

LL. Edw. Conf. c. 15.

Besides, punishments were not confined to pecuniary mulcts, for we read of various corporal pains inflicted on offenders, as imprisonment, mutilation, slavery, and death, in addition to the penances imposed by the church. A thief who was caught in the act of stealing might be killed with impunity if he attempted to escape or made resistance; and theft was afterwards made a capital offence, unless the thief or his friends redeemed his life by paying his full were. A thief frequently accused of theft was to lose a hand or a foot; and, by a law of Athelstan, he was upon a second conviction to be hanged. None were to escape punishment who were above the age of twelve, or who stole above the value of twelve pence. The accomplices and aiders of thieves were subject to the same penalties as thieves themselves. So, likewise, if a thing was stolen, and the family of the thief was

Stealing.

LL. Wih. c. 35.

LL. Inæ, c. 12; LL. Inæ, c. 37; Jud. Civ. Lund. apud Wilk. 70.

Jud. Civ. Lund. apud Wilk. 65.

LL. Inæ, c. 7.

privy to it, they were all to be made slaves; but there was an exception in favour of the wife, who was supposed to be under the subjection of her husband, and was therefore not considered as a party in the stealing, unless the things stolen were found in her separate possession.

In some cases the life or limb of the offender which was forfeited might be redeemed by the payment of the full were, that is, by the full price of the man's life; but crimes of great enormity, as killing the king or one's lord, arson, sacrilege, and some others, were not to be expiated by any thing but death.

LL. Alf. c. 4; LL. Can. c. 6; LL. Edw. Conf. c. 7.

Outlaws.

If an offender fled from justice, and was not to be found within the space of thirty-one days, he was outlawed, and any one might kill him if he made resistance. An outlaw was called in the Saxon *wulfesheofod*, that is, wolf's-head; which was as much as to say that any one might kill him in the same manner as they would a wild beast. Those who broke their bail, or violated their word, were to be imprisoned for forty days; and if they attempted to escape, they were to be outlawed. A common cheat was to be put to death, and denied Christian burial.

LL. Edw. Conf. ubi supra.

LL. Ethel. c. 5; LL. Can. c. 23.

But it was not merely by the severity of punishments that the Saxon kings endeavoured to reform their subjects; they also aimed at drawing the social ties closer together, humanizing the manners and affections of the people, and giving them a respect not only for the law and government, but also for themselves and their good name. The institution of the friborgs, before mentioned, had a peculiar tendency to produce these salutary effects; and, according to the accounts of historians, it was so efficacious in the commencement, that if a bag of money were left by the road-side for months together, it would not be taken.

Ingulph. Hist. 495; Gul. Malms. 24.

Breach of the peace.

To prevent the causes and beginnings of quarrels, laws were made against every breach of the peace, but particularly in certain places, or before certain persons, whose presence the Saxons were taught in a particular manner to respect. Fighting, or even drawing a weapon, in the presence

LL Inæ, c 45.

of the archbishop, was punished with a fine of 150 shillings; before a bishop or an alderman, with a fine of 100 shillings. If the offence was committed near the residence of the king, or in the king's court, the life of the offender was to be at the king's mercy. The *pax regis*, or the verge of the court as it was afterwards called, extended from the palace-gate to the distance of three miles three furlongs, three acres, nine feet, nine palms, and nine barley-corns. Besides, the *pax regia*, or King's protection, was attached to other places, as the four public roads, Watlingstrete, Foss, Hakenildstrete, and Erminstrete; also to navigable rivers carrying provisions to cities and towns, whence such public ways were designated in a peculiar manner the King's highways. On the same principle there was the *pax ecclesiæ*, or a particular privilege attached to churches. Sacrilege was punished with the loss of the hand which committed the offence, unless redeemed with the payment of the full were; and any breach of peace in a cathedral incurred the penalty of death, unless redeemed; but if committed in inferior churches, it was only punishable with a fine, according to the importance of the place.

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LL. Alf. c. 30.

Pax Regis.

Hicks' Diss 114.

LL. Athels. apud Wilk. 63.

LL. Alf. c. 8.

LL. Alf. c. 30.

As a further prevention of quarrels and breaches of the peace, calumny and defamation were visited with a heavy penalty even at an early period. By a law of Hlothaire, king of Kent, a calumniator or defamer was obliged to pay one shilling to the person in whose house the words were uttered, six shillings to the person calumniated, and twelve shillings to the king. By a law of Alfred, Edgar, and Canute, a spreader of false reports was to lose his tongue, unless he redeemed it by paying his full were. Besides, breaches of the peace in the houses and on the premises of private persons were visited with penalties, according to the condition of the party or the circumstances of the case; in all which particulars we may trace the origin of many parts of our jurisprudence as it exists in the present day; but there was one law among the Saxons which has not survived that period, namely, a law of Hlothaire, king of Kent, which inflicted a heavier punish-

Defamation

LL. Hloth. apud Wilk. 9.

LL. Alf. c. 28; LL. Edg. c. 4; LL. Can. c. 26.

LL. Hloth. c. 12.

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ment on breaches of the peace if committed in alehouses than if they were committed elsewhere.

Reeves' His. i. 17; LL. Inæ, c. 34; 1 Comm. 429; LL. Alf. c. 38.

If any one was present at the death of a man, he was looked upon as *particeps criminis*, and liable to a fine; but there was an exception made at that time, as there has been since, in favour of those who stood in a near relation to each other. By a law of Alfred a slave might fight in defence of his master, or a father might defend his son, and a man might attack any one whom he caught with his wife.

Witnesses to contracts.

LL. Hloth. c. 16; Ethel. c. 4: Athel. c. 12; Can. c. 22.

For the prevention of frauds, as well as of disputes, it was more than once enjoined, that no contracts or bargains should be made but in the presence of two or three witnesses, or of the gerefa; and if any thing was sold without observing this law, the thing bargained for was to be forfeited.

In addition to the above-mentioned regulations for the preservation of the peace, the Saxons adopted the humane practice of sanctuaries, or places of refuge for offenders, particularly in the cases of homicide; after the manner of the cities of refuge among the Jews, and the *asyla* or inviolable cities among the Greeks and Romans.

Sanctuary.

LL. Athels. c 2; LL. Wil. apud Wilk. 13; LL. Alf. c. 2, 38.

After the introduction of Christianity, the Saxons converted their churches, as the Britons before had converted their temples, into sanctuaries, whither homicides might flee to protect themselves from the hasty resentment of the injured party. They might also seek refuge with an alderman, an abbot, or a thane, for three days; and with a bishop for nine days. A penalty was inflicted on the violation of sanctuary. By a law of Alfred, no one was to take revenge until he had demanded compensation, and it had been refused. If the offender fled to his own house, the injured party might besiege him there for seven days; and, if needful, might have the assistance of the magistrate to prevent his escape. If, at the expiration of that time, the aggressor were willing to surrender himself and his arms, his adversary might detain him for thirty days, but was afterwards obliged to restore him safe to his friends, and be contented with the

compensation. This privilege of sanctuary extended also to thieves, who in such cases might make restitution of the plunder; but if the thief repeated the offence, he was then obliged to leave the church, and *provinciam forisjurare*, to forswear the county, that is, swear that he would not return to it; which, when applied to the kingdom, was afterwards called abjuring the realm.

LL. Edw. Conf. c. 6.

Abjuration.

For the more certain detection of offenders, it was ordained by a law of Ina, that whoever suffered a thief to escape was to pay the were or *forgyld* of the offender; and if it were an alderman, he was to lose his office. In confirmation of this, it was enjoined by Canute that whoever suffered a thief to escape *absque clamore*, that is, without making *hutesium et clamorem*, or hue and cry as it was afterwards called, was to suffer the punishment of the thief, if he could not purge himself. So, likewise, if any one neglected to join in the clamour when he heard it.

LL. Inæ, c. 36.

LL. Can. c. 26.

Hue and cry.

As a further means of bringing offenders to justice, endeavours were made to give all possible solemnity to the taking of an oath by various religious rites, which accompanied the ceremony; besides the penalties which were inflicted on those who violated the obligation of an oath.

LL. Athels. apud Wilk. 63.

By the league between Edward and Guthrum the Dane false swearers were banished; by a law of Athelstan they were denied Christian burial; by one of Edmund they were incompetent to give evidence until they had purged themselves. Perjury by a law of Canute was punished with the loss of the hands, and the payment of half the full were.

Fœd. inter Edw. et Guth. c. 11; LL. Athels. c. 25; LL. Edm. c. 1; LL. Can. c. 33.

CHAPTER V.

WILLIAM I. AND II.

Confirmation of the Saxon Laws.—Feudal Tenures.—Earls.—Sheriffs.—Courts.—Separation of the Secular from the Ecclesiastical Judicature.—Trial by Battel.—Trial by Jury.—Forest Laws.—Pleadings in French.—Domesday Book.—William II.

CHAP. V. WILLIAM I. II.

THE accession of William I., surnamed the Conqueror, has been generally regarded as a memorable epocha in the history of English law, on account of the changes which are supposed to have taken place in the nature of landed property, the judicial forms of proceeding, and, what was still more, in the tone and temper of the times, which required a more rigorous exercise of the law. But, great as these changes may have been, they appear to have sprung not so much from any determination on the part of the conqueror, as from the circumstances which accompanied his taking possession of the English throne. Without entering into the question respecting his title, it is clear that he considered himself as the legitimate successor to Edward the Confessor, and founded his claim to the throne not so much on his victory over Harold as on the title which he had acquired by the will of his predecessor. His harsh treatment of the English was evidently the consequence of their disaffection and continued resistance; and, had he met with a better reception from his English subjects, it is fair to conclude that he would have dealt with them more as a king than as a master. "William," says Mr. Reeves, "put off the character of an invader as soon as he conveniently could, and took all measures to quiet the kingdom in the enjoyment of its own laws." The correctness of this observation may best be

Reeves' His. Eng. Law, i. 30.

learnt by a statement of facts than by any enlargement on an unimportant point of dispute.

Confirmation of the Saxon laws.

As soon as the king found leisure from the occupations of war, he turned his thoughts to the establishment of good laws for the government of the realm: wherefore, in the fourth year of his reign, he called together his barons at Berkhampstead; and in the presence of Lanfranc, archbishop of Canterbury, he solemnly swore that he would observe the good and approved laws of Edward the Confessor. At the same time, selecting twelve men from among the English who were learned in the laws, he desired them to make a collection of such laws and customs as had been in force in the time of the Saxon kings.

Ingulph. Hist.; Matt. Paris. Vit. Fred. Abb. Sanct. Alb. Hoved. 600.

When the collection was finished and presented to the king, he seemed to give the preference to the Danish laws; upon which we are informed that the commissioners, breaking out into great lamentations, conjured the king, by the soul of King Edward, that he would suffer them to be governed by the laws and customs in which they and their children had been brought up. The king yielded to their entreaties, and called a general council, at which he consented that the laws of Edward the Confessor, with such additions and alterations as he thought proper to make, should in all things be observed. Gervasius Tilburiensis, who lived near that time, observes, "Propositis legibus Anglicanis secundum triplicitam earum distinctionem in Merchenlage, West-Saxonlage et Danelage; quasdem earum reprobans, quasdem autem approbans, illis trasmarinas leges Neustriæ, quas ad regni pacem tuendam efficacissimi videbantur, adjecit." Wherefore it appears that the collection was of a twofold nature; comprehending, in the first place, the laws of Edward the Confessor, properly so called; and, secondly, such additions as the king thought proper to make: all which are to be found transcribed in Mr. Selden's "Notes on Eadmer," and also in Wilkin's "Collection of the Anglo-Saxon Laws."

Hale Hist. Com. Law, c. 5.

Feudal Tenures.

Among the most important and remarkable of William's

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laws must be reckoned those which relate to knight's service and military tenures. One of these laws runs thus:—"Statuimus, ut omnes liberi homines fœdere et sacramento affirment quod intra et extra universum regnum Angliæ (quod olim vocabatur regnum Britanniæ) Wilhelmo suo domino fidelitate ubique servire cum eo, et contra inimicos et alienigenas eum defendere." From this law it may be gathered, that two things were now required from the king's tenants, or the possessors of feuds, according to the Norman system, which had not been required by the Saxon kings. First, that they should take an oath of fealty or fidelity to the king; and, secondly, that their military service was to be indeterminate, and might be required of them either at home or abroad; whereas, among the Saxons, it was confined to the defence of the realm. By another law the king declared his grants to be *jure hæreditario*, and thus converted feuds into hereditary fiefs, which among the Saxons were, as they had been originally every where, beneficiary and for life. From this change flowed many consequences, which had a material influence on landed property, such as wardships, marriage, reliefs, aids, and dower; but as the records of those times make little or no mention of these particulars, it is probable that they were not all as yet ingrafted into the system, but gradually gained a footing, as circumstances favoured.

Spelm. Concil. ii. 4.

The clergy were charged with military service, on account of the lands which they held in right of their sees; and were bound, the same as the barons, to do suit at the *curia regis*, which was in conformity with the practice of the Saxons. For then the bishops and the thanes, by virtue of their office, took an important part in the administration of justice; but, as the barons had acquired a permanent right in their lands, they became hereditary counsellors of the crown, having both an obligation and a right to attend the courts and councils of the king.

William expressly assured his earls, barons, and other tenants *in capite*, that he would protect them in the enjoy-

ment of their possessions, which they were to hold free, "ab omni injustè exactione et ab omni tallagio." This language was in conformity with that to be met with in the Saxon grants.

The other alterations in the laws introduced by the Conqueror were such as regarded the administration of justice. The government of the counties was intrusted to the earls, with a similar jurisdiction as in the time of the Saxons, except in the county of Chester, which was erected into a county palatine in favour of his nephew Hugh Lupus, to whom he granted "hunc totum comitatum tenendum sibi et hæredibus suis ita libere ad gladium sicut ipse rex tenebat Angliam ad coronam." By reason of this grant, the earl palatine had all the high courts and officers of justice which the king had, with criminal jurisdiction.

Earls.

Co. 4, Inst. 211.

The office of the sheriff probably acquired importance after the conquest. He was called in Latin *vice comes*, because he performed all the ministerial duties of the earl, and in his judicial character he took the place of the alderman, at least for a time. The latter officers were now confined to cities and boroughs, where they acted as judges.

Sheriffs.

Matt. Paris, 1196.

Justice was administered in the early part of this reign in the same courts and nearly in the same manner as in the time of the Saxons, namely, in the scyregemote, now called the *comitatus*, or county court; in the hundred court, now called the *hundredum;* and in the lords court, or *curia baronis*, as it was named, the title of baron having taken the place of that of thane. Sometimes the two former of these courts were summoned at the pleasure of the king, when any cause of importance demanded their attendance. Thus on occasion of restoring to Lanfranc, archbishop of Canterbury, the possessions which his predecessor Stygand had forfeited, "rex præcepit totum comitatum absque mora considere, et homines comitatus omnes francigenos et præcipuè Anglos in antiquis legibus et consuetudinibus peritos in unum considere."

Courts.

Hicks' Diss. 31; Spelm. Gloss. in Voc. Comitatus.

This court, which was held at Pinenden, 6 W. 1, A. D. 1072,

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was attended by one archbishop, three bishops, the earl of the county, the vice-earl or sheriff, besides a number of knights and freeholders, who were called upon to attest on oath what they knew respecting the lands and possessions in question. The inquiry lasted for three days, during which several manors were adjudged to belong to the archbishop, which had been for some time in the possession of Odo, bishop of Baieux, uterine brother of the king. Sometimes the county courts, as well as those of the hundred, were summoned from more than one county or hundred, of which the writs and charters of William and his son Rufus furnish several examples.

Dugd. Orig. Jur. 30.

Separation of the secular and ecclesiastical judicature.

Co. 4 Inst. 259; Wilk. Leg. Sax. 292; Dugd. Orig. Jur. 28.

The most important change produced in the judicature of the kingdom, was the separation of the ecclesiastical from the secular courts, which we learn from a charter enrolled, 2 Ric. II. No. 5, *Pro decano et capitulo ecclesiæ beatæ Mariæ de Lincoln*. From this it appears, that no causes relating to the discipline of the church were to be carried before a secular magistrate, and that every person who was answerable to the ordinary for a breach of the canon law should make his appearance at the place appointed by the bishop where the cause was to be determined, according to the form and manner prescribed by the ecclesiastical constitutions. What may have been the immediate consequence of this measure is left to conjecture, history being silent upon the subject; but it is natural to infer, that the Bishop's Consistory, or the Council-house, in which he or his officers sat to hear ecclesiastical causes, was erected at this period, or very shortly after. It is also probable that the archdeacon's court was nearly of the same date; for although the archdeacons had hitherto acted by a delegated authority, yet they gradually acquired an independent jurisdiction, in proportion as the bishops were compelled, by reason of their tenures, to give their attendance at court, and, consequently, to intrust to the former a part of their official duties. To whom appeals were made from the bishop's consistory at this period, and in what manner they were made, we have no

Warner's Ecc. Hist. i. 273.

means of knowing; but we may justly conclude, that, as the pope had as yet obtained no power in England, appeals were made to the king, as in secular causes. The archbishop's court, called *Curia de Arcubus*, or Court of the Arches, to which appeals were afterwards made, is not mentioned before the reign of Edward I.

Co. 4 Inst. 337.

Trial by battel.

To the modes of trial already in use, was added by this king, also, that by the duel or battel, a mode of deciding judicial contests which, as we learn from Paterculus, was established among the northern nations in his time. Superstition, combined with their passion for arms, gave birth to the persuasion that successful valour was the best test of truth and innocence. For this, like other ordeals, was an appeal to the judgment of God for the discovery of the truth or falsehood of an accusation that was denied, or of a fact that was disputed, founded on the supposition that heaven would grant the victory to him who maintained the just cause. Thus did the judicial combat become the most honourable, and, at the same time, the most common, method of deciding disputes among the different nations of Europe. The first law we meet with on the subject occurs in the code of Gundebald, A.D. 501, king of Burgundy.

Vel. Pat. l. 2, c. 118.

Du Cange Gloss. ad Voc. Duellum; Spelm. Gloss. ad Voc. Campus.

Leg. Burgund. tit. 45, apud Lindenbrog. Cod. Antiq.

The Saxons in England appear never to have adopted this practice, which is not surprising considering the love of justice and the equitable spirit which reign throughout their several codes. As it was therefore an innovation not likely to be agreeable to the English, the Conqueror did not impose it as a law upon his new subjects, but left them their choice. An Englishman was to have the same liberty as a Frenchman had in his own country, of appealing or accusing the latter, by duel, of theft, homicide, or any other crime. In cases of outlawry, an Englishman might purge himself by the ordeal; but the same liberty was not conceded to the Frenchman, who was obliged to defend himself by the duel. It is, however, politicly added, by way of shaming the English into compliance, that if an Englishman was afraid to stand the trial by the duel, then the Frenchman was to

Hale's Hist. Com. Law, c. 5.

LL. Gul. i. c. 67.

Ibid. c. 68.

Ibid. c. 69.

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purge himself *pleno juramento*, that is, by the oaths of the required number of compurgators. An appeal like this to a people not wanting in courage had the effect, as may be supposed, of establishing the practice. To this principle of martial pride it must be ascribed, that, notwithstanding the repugnance felt and expressed by succeeding kings to so unjust a mode of deciding legal controversies, the law continued so long in force without being expressly abolished by the legislature.

Trial by jury. Hicks' Thes. Diss. Epist. 38, et seq.

As to the trial by jury, we read in this reign, for the first time, of twelve men sworn to speak the truth on any particular matter. In a cause between Gundulf, bishop of Rochester, and Pichot, the sheriff, respecting certain lands retained by the latter which belonged to that see, when the suitors or freemen of the county court, awed by the influence of the sheriff, gave their verdict in his favour; the bishop of Baieux, who presided, suspecting their veracity, and the motive of their decision, commanded them to choose from among their number twelve, who should confirm it on oath. This practice is generally supposed to have been more according to the Norman than the Saxon usages; and, on that account, the introduction of the trial by jury is commonly dated from the period of the conquest. It had been established among the Danes by a law of Regnerus, surnamed Lodbrog, since the year A.D. 820, and was carried by Rollo the Dane into Normandy, when he took possession of that duchy. It appears, however, to have been resorted to only on this particular occasion, for we read nothing of this mode of trial in civil suits before the reign of Henry II., when it became a regular part of our jurisprudence.

Reeves' Hist. i. 84.

Hicks' Diss Epist. 39, et seq.

Ante, p. 37.

The law of Canute de Murdro, which had for its object the protection of the Danes from the resentment of the English, was now employed by the conqueror in favour of his countrymen. When a Frenchman was killed, and the people of the hundred had not apprehended the slayer, they were to pay forty-seven marks by way of fine, which was called murdrum. In consequence of this law the person killed was

always considered to be a Frenchman, unless proved to be English by his friends or relations, from which circumstance arose presentments of Englishery, as they were afterwards called.

Forest laws.

As the Conqueror was much addicted to hunting, and rigorously enforced the laws of the forest, it has been usual to ascribe to him not only the code of forest laws, but also the erection of the courts for the administration of those laws; but this opinion does not appear to be well founded. No mention is made of the forests in the laws that go under his name; and we find that the king's forests and chaces were protected by legal enactments before the Conquest, as is fully expressed in a law of Canute: "Sit quilibet homo dignus venatione sua in sylva et in agris sibi propriis et in dominio suo; et abstineat omnis homo a venariis regiis, ubicunque pacem eis habere velit." Sir Henry Spelman has given a number of other laws of this king on the same subject.

LL. Can. c. 77.

Spelm. Gloss. Voc. Forestæ.

It is true that William erected the New Forest, but by far the greater part of the forests in England must have existed from the earliest periods. "For the antiquity of such forests in England," says Lord Coke, "the best and surest argument is, that the forests in England, being sixty-nine in number, except the New Forest in Hampshire, erected by William the Conqueror, and Hampton-Court Forest by Henry VIII. and by authority of Parliament, are so ancient, as no record or history doth make any mention of their erection or beginning."

Co. 4 Inst. 319.

That the courts and laws of the forests existed among the Saxons, is furthermore clear from the names swainmote, footgeld, and other terms, respecting the forests which are of Saxon origin.

Pleadings in French.

The introduction of the French language into our courts of judicature has been also ascribed to the Conqueror, who is said to have required that it should be generally taught in schools, to the exclusion of the English; with a view, as some have imagined, of imposing a badge of slavery on a con-

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quered people: but others have supposed, with greater reason, that this was purely a measure of expediency: as the administration of the laws rested principally with himself and his Norman followers, it was of importance that judicial proceedings should be conducted in a language that was familiar to them. Sir Matthew Hale is of opinion, that he thereby intended to render the union closer between the two countries. The event at least fully justifies this inference. The French became fashionable among the higher orders, whilst, on the other hand, the English retained the ascendancy as the general language of the country, and finally became the only one in use.

Spelm. Cod. apud Wilk. p. 288. Seld. Not. in Eadm 189. Hale, Hist. Com. Law. c. 5. Tyrr. Introd. 64. Luders on the Use of the French Language.

Domesday book.

One of the most distinguished measures of this reign, was the great survey of the demesne lands throughout the land recorded in two books called Great Domesday or Doomsday Book, and Little Domesday Book, which is said to have been formed upon the model of a similar work executed by Alfred, not now extant. In the seventeenth, or, according to some, in the fifteenth year of his reign, William appointed commissioners for the purpose of executing this work, which was completed A. D. 1086. As the object of this work was to show what were demesnes of the crown and what were not, it has always been resorted to in our courts, to determine all questions respecting ancient demesne.

Chron. Sax. 190. Ingulph. Hist. 79. Hoved. 460. Matt. West. 229. Mad. Hist. Excheq. I. 296.

Many have been the conjectures on the etymon of the word doomsday or domesday. From the literal meaning of the words, doom and day, signifying the day of judging; it has generally been supposed to have an allusion to the final judgment. Some have imagined that it signified literally the lord's advertisement to his tenants, from *dom* or *dominus*, a lord, and *deia*, an advertisement; the most natural conclusion, however is, that by the day of judging, is to be understood the work of judicially determining. The *domboc* of the Saxons was rendered in Latin by *liber judicialis*, and Doomsday Book is also commonly rendered *liber judicialis* or *censualis*, and sometimes *magna rolla*, Winton.

Baringt. Obs. on Stat. 270. Spelm. Gloss. Voc. Domesdies.

Du Cange, Gloss. ad Voc.

William II.

William II. is not known as a legislator, and probably followed the course laid down by his father.

CHAPTER VI.

HENRY I.

Charter of Henry I.—Abolition of Moneyage.—Feudal Burdens lightened.—Code of Laws.—Descents.—Alienation.—Administration of Justice.—Curia Regis.—Curia Baronis.—Reunion of the Secular and Ecclesiastical Judicature.—Election of Trial by Jury.—Criminal Law.—Ecclesiastical Discipline.—Appeals to the Court of Rome.—Mode of electing Bishops changed.

CHAP. VI. HENRY I.

Charter of Henry I.

Abolition of moneyage.

Feudal burdens lightened.

Co. 2 Inst. 8.

HENRY I. showed a decided predilection for the Saxon laws. To conciliate the affections of his English subjects, he granted them a charter, in which he expressly confirmed the laws of Edward the Confessor, that had been approved by his father. He likewise made many provisions that were calculated to lessen the burdens of the people. He abolished moneyage, an oppressive tax of Norman origin, paid every three years, to prevent the renewal of the coinage. He relieved his barons and other tenants *in capite*, from some feudal burdens, which appear in the two former reigns to have been arbitrarily imposed. He required that none but a just and reasonable relief should be paid, and that nothing should be paid for a licence to marry their daughters, nor a licence refused, unless any baron wished to enter into an alliance with the king's enemies. He likewise recommended his barons to observe the same rules towards their tenants. The relief here spoken of as the *justa et legitima relevatio*, appears to be the same as the period of the Saxons, although in after times they are spoken of as distinct obligations. Notwithstanding the provisions here made respecting licences to marry, marriages became, in process of time, one of the most oppressive of the feudal burdens.

This charter, which laid the foundation for the subsequent charters of Henry's successors, is entitled, "Institutiones Henrici Primi," the preamble to which runs as follows: "Anno Incarnationis Dominicæ MCI Henricus filius Wilhelmi regis, post obitum fratris sui Wilhelmi, Dei Gratia Rex Anglorum, omnibus fidelibus salutem, sciatis me Dei misericordia et communi concilio baronium totius regni Angliæ ejusdem regem coronatum esse."

Blackstone's Law Tracts.

Matthew Paris has twice recited this charter of King Henry, namely, under the years 1100 and 1213, and two copies of it are entered in the Red Book of the Exchequer, one of which is prefixed to King Henry's laws, published by Lambard and Wilkins. It is likewise printed in Richard of Hagustald's history of King Stephen, and a copy of it, taken from the Textus Roffensis, has since been published by Hearne, and afterwards again by Mr. Justice Blackstone in his Law Tracts. This is acknowledged to be the most correct copy of any, being compiled by Ernulf, bishop of Rochester, who died A.D. 1114.

Lamb. Archaion; Wilk. LL. Anglo. Sax.

Code of laws.

Besides this charter, there is a code of laws which bears the name of this king, and was probably compiled under his direction. It is to be found transcribed in the Red Book of the Exchequer, from which the contents have been printed in the collections of Lambard and Wilkins.

Hale, Hist. of Com. Law, c. 7.

It is evident, from the miscellaneous character of this collection, and the mixture of Saxon and Norman words, and laws, that it is made up of the laws called the Laws of Edward the Confessor, with such additions as the king thought proper to make from other sources. Several rules of the common law were taken from the sentences of the fathers, and correspond with what is to be found in the works of Ivo and Gratian; whence, as these works appeared after the death of this king, it has been doubted whether the collection which is handed down under his name, be the same as was made by his command; and at all events it is generally supposed that the extracts from the canon law were subsequently added. On this point the reader will find

Wilk. LL. Anglo-Sax. 239.

ample information in the notes subjoined to Dr. Wilkins's edition of these laws.

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The law of descent, as respects land, appears to have varied in this collection both from the Saxon and Norman codes, for whereas by the former they descended equally to all the sons, and by the latter to the eldest son only, Henry adopted a middle course, and directed the principal estate to descend to the eldest: "Primum patris fœdum primogenitus filius habeat. Emptiones vero vel deinceps acquisitiones suas det cui magis velit." As to collateral descents, the law runs thus: "Si quis sine liberis decesserit, pater aut mater ejus in hæreditatem succedat, vel frater vel soror si pater et mater desint, si nec hos habeat, soror patris vel matris et deinceps in quintum geniculum, qui cum propinquiores in parentela sint, hæreditario jure succedant, et dum virilis sexus extiterit et hæreditas abinde sit, fœmina non hæreditetur." This was in conformity with the law of the Saxons on the continent, from which it is taken verbatim.

HENRY I. *Descents.* Hale, Hist. of Com. Law, c. 11. LL. Hen. I. c. 70. Lindenbrog. Cod. Antiq. 476.

A restriction was laid on the alienation of inheritable lands in the words of the law of Alfred before mentioned, but this restriction was not extended to purchased lands, as appears from the clause "Acquisitiones suas det cui magis velit."

Alienation.

In the administration of justice, Henry followed the Saxon schemes of jurisprudence, with a slight intermixture of Norman principles and forms. The supreme court of the kingdom was now regularly distinguished by the name of the *Curia Regis*, or the King's Court; an appellation that appears to have been introduced at the Conquest; but the jurisdiction of this court was defined much in the same manner as it is by the laws of Canute and Edward the Confessor. It took cognizance of such matters as immediately concerned the *pax regis*, or as it was afterwards more emphatically expressed, the king's crown and dignity, such as the violation of the king's protection, contempt of the king's writs, killing or injuring any of the king's household, treason,

Curia Regis. LL. Can. c. 12, 13, 14; LL. Edw. Conf. c. 35. LL. Hen. I. c. 10.

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cheating, slander, outlaws, false coiners, treasure trove, wreck of the sea, rape, offences against the forest laws, reliefs of the barons, fighting in the king's palace, breaches of the peace in a man's house, harbouring an outlaw, desertion, unjust judgments, denial of justice, evading the king's law, offences on the king's highway, and other matters of a similar nature. The jurisdiction of the king's court is thus defined to distinguish it from the jurisdiction of the sheriff, or the franchises enjoyed by the lords in their courts, which were now distinguished by the Norman appellation of *Curia Baronis*, or by the Saxon appellation of *halmote*, and defined by the Saxon terms *sac*, *soc*, *thol*, *theam*, *infangthefe*, and *outfangthefe*, before explained.

Curia Baronis. LL. H. I. c. 9. 10. Ibid. c. 20.

Ante, p. 24.

The king's judges were taken from among the barons or thanes of the county (for they are indiscriminately so called), but the *justitia*, justice, or *justitiarius*, justiciary, appears to have taken the place of the Saxon *aldermann*, and probably with an extended jurisdiction.

LL. H. I. c. 33. *Justitia.* Spelm. Gloss. ad Voc. Justitia.

The county court was to be held twice a year, as in the time of the Saxons, and the hundred court, or wapentake, twelve times, and oftener if needful. Besides, Henry wished to recur to the practice of determining ecclesiastical as well as civil matters in the county court, as was done before the Conquest. This we learn from one of his laws, which runs as follows: "Sicut antiqua fuerit institutione formatum, generalia Comitatuum Placita certis locis et vicibus, et definito tempore per singulas Angliæ provincias convenire, nec ullis ultra fatigationibus agitari, nisi propria regis necessitas, vel commune regni commodum sæpius adjiciant. Intersint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermanni, præfecti, præpositi, barones, vavassores, tungrevii et cæteri terrarum domini deligenter intendentes, ne malorum impunitas aut graviorum pravitas, vel judicum subversio, solita miseros laceratione conficiant. Agantur itaque primo debita veræ Christianitatis jura: secundo Regis Placita, postremo causæ singulorum dignis satisfactionibus expleantur."

County and Hundred. LL. H. I. c. 7, 51.

Reunion of the secular and ecclesiastical jurisdictions.

This projected reunion, which, if it had been carried into effect, would have restored the county court to its ancient splendour, was frustrated by archbishop Anselm; who, wishing, according to the policy of the Romish See, to keep the clergy as distinct from, and as independent of, the laity as possible, prohibited bishops from determining secular causes.

Spelm. Cod. Vet. apud Wilk. LL. Anglo-Sax. 301.

Placita.

The causes or suits in a court were now called *placita*. *Placitum*, in French *plait*, was employed by the feudists to denote any assembly or court of the freeholders or vassals, which was sometimes held in the open fields, whence the term has been derived from the German *platz*, an open space, or the Latin *platea*, a highway; but it is with much more reason to be deduced from the *placitum* of the Roman law, which signified a sentence or judgment. *Placitum* was also used at this time in the sense of a day, as *placitum nominatum*, a day appointed for the defendant to plead or answer; *placitum fractum*, a day lost to the defendant; also in the sense of a mulct or fine imposed in courts.

LL. H. I. c. 7. 33. Du Cange, ad Voc. Wynne's Eunom. Dial. II.

LL. H. I. c. 29, 46, 54. Ibid. c. 12, 13.

Trial by jury.

The trial by jury in criminal suits was recognised in this code, as far at least as regards some of its most important principles. By one law, every one was to be tried by his peers, who were of the same neighbourhood as himself. "Unusquisque per pares suos judicandus est, et ejusdem provinciæ, peregrina vero judicia modis omnibus submovemus." By another law the judges, for so the jury were then called, were to be chosen by the party impleaded, after the manner of the Danish *nembdas*; by which, probably, is to be understood that the defendant had the liberty of taking exceptions to, or challenging the jury, as it was afterwards called.

LL. H. I. c. 3. 31.

Ibid. c. 5.

Ante, p. 32.

Criminal law.

Crimes, offences, and punishments are, for the most part, described by the Saxon terms, as *hlafordswice*, treason; *husbrech*, housebreaking; *bernet*, arson; *eberemorth*, open killing; *openthifthe*, open theft; *healsfang*, pillory, and the like. Besides, the principle of redeeming offences by the

were, or a pecuniary compensation, was fully admitted, and crimes are distinguished into such as were redeemable, and such as were irredeemable. The latter are precisely the same, and in the very terms of those given in the laws of Canute, with the addition of some others, but with the exception of theft, which was now made capital, without the possibility of redemption.

L.L. H. I. c. 13. Ante, p. 38

Ecclesiastical law.

For the maintenance of ecclesiastical discipline, Henry adopted several of the constitutions of Edgar and the other Saxon kings; but he appears also to have yielded to the growing influence of the Romish see. From one of his laws we find appeals to the court of Rome expressly admitted; and from the records of those times, we learn that he changed the manner of electing bishops, to the prejudice of the secular power, in both which points we have seen that the Saxons resisted any interference on the part of the pope. In all probability they conducted their elections much in the same manner as prevailed at that time throughout Europe: the bishops being chosen by the chapter of the cathedral, by virtue of a licence from the crown, called afterwards a *conge d'elire*, and the election confirmed by the king's investing them with the temporalities. That such was the practice at the time of the conquest is clear, from the words of Ingulphus. "Nulla electio prælatorum erat more libera et canonica; sed omnes dignitates, tam episcoporum quam abbatum, per annulum et baculum regis curia pro sua complacentia conferabat." About this period, however, Gregory VII. an ambitious and arrogant pope, who aimed at enlarging the papal power, denied the right of princes to grant investitures, and threatened excommunication to all princes who granted, and to all prelates who received them. This was resisted with great vehemence by the emperor Henry, but the contest was at length terminated by a sort of a compromise on the part of the latter, who consented to change the form of the investiture, and instead of the king delivering to the prelate, as heretofore, a ring and a pas-

L.L.H.I.c 5.

Appeals to the Court of Rome.

Mode of electing bishops changed.

Ante, p. 17.

Ingulph. Hist., Seld. Jan. Angl. c. 1. s. 39; 1 Comm. 376.

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toral staff or crosier, that the latter should, for the future, be invested with the temporalities simply *per sceptrum*. The kings of England and France followed the emperor's example, and accordingly we are informed that Henry I. in a council of London, held A.D. 1107, in the presence of Anselm and all the bishops and abbots, &c. relinquished the right of investiture after the old form.

Eadm. c. 1. Spelm. Cod. Vet. apud Wilk. LL. Angl. Sax. p. 301.

CHAPTER VII.

STEPHEN.

Danegeld abolished.—Charters of Stephen.—Introduction of the Civil and Canon Law.—Comparison between the Civil Law, Canon Law, and Common Law.

CHAP. VII.

STEPHEN.

Danegeld abolished.

Hen. Huntingd. l. 8; Lytt. Hist. Hen. II.

The turbulent and unsettled reign of Stephen, afforded but little opportunity for legislation, yet his reign is not altogether barren of materials for the legal historian. The abolition of Danegeld is commonly dated from the day of this king's coronation, but Lyttleton speaks of a record of its payment in the twentieth year of Henry II. Danegeld, literally money for the Danes, was a tax first imposed upon the Saxons in the reign of king Ethelred, for the purpose of bribing those invaders to desist from their depredations, and was afterwards made permanent for the purpose of maintaining an armed force to defend the coasts, and became one of the chief branches of the royal revenue. In the time of Canute, it is said to have amounted to the sum of 71,000 Saxon pounds.

Charters of Stephen.

As an additional means of conciliating the favour of his subjects, Stephen granted them two charters; but he is generally charged with having been little scrupulous in the observance of either. By the first he confirmed the charter of his predecessor Henry, particularly as regards the Saxon laws; and by the second he renewed and enlarged the privileges bestowed on the clergy, both by the Conqueror and his son Henry. Of the first there is a copy preserved in an ancient MS. in the College Library. Richard of Hagustald, the historian of this prince, has given the latter of these two charters, the original of which is said to have been in the hands of Mr. Hearne, although it now appears to be lost.

Blackstone's Law Tracts, 287.

Introduction of the civil and canon law.

The principal circumstance worthy of notice in this reign, was the regular introduction of the civil and canon law, which is commonly supposed to have taken place at this period. The Roman law was, in all probability, used by the Romans in this country while it was in their possession, at least this is conjectured to have been the case, from the circumstance of the post of judge having been filled by some Roman lawyers. Æmylianus Papinianus, the celebrated jurist, exercised the office of pretor under Severus, having as his assessors, the no less celebrated lawyers Ulpian and Paulus. When the Romans withdrew, it appears that the Britons ceased to follow their laws, in so much that no vestiges of them remain in the laws of the Welch. The Saxons, like the Britons, also adhered to their own laws and customs, with the exception of some few particulars before mentioned. The same was the case in Italy and other countries, where the Roman laws fell considerably into disuse on the decline of the empire, and were only partially retained. In proportion, however, as the Romish church extended its influence, these laws, which it much favoured, were again brought into use; and after the discovery of a complete copy of the Pandects at Amalfi, about the year 1128, the study of the civil law revived, and became fashionable in England and other countries of Europe. Irnerius, or Wernerius, as he is sometimes called, was appointed to read lectures upon it at Bologna, and Vacarius, an Italian professor, began about the same time to teach it at Oxford. The eagerness with which the clergy promoted the study of the civil law provoked the jealousy of the common lawyers to such a degree, that, whenever they met with a copy of the Roman law, they are said to have either torn it in pieces or thrown it into the fire. They likewise procured an ordnance from Stephen, to impose silence on Vacarius, and prohibit the reading of books in the civil law; but notwithstanding this injunction, the rage for studying the civil law increased, and degrees were conferred at the Universities on proficients in this as well as other faculties. Besides, the clergy in

Leunclav. in Vit. Dion. Duck. de Ort. et Prog. Civ. Leg. 289, 359. Seld. Diss. Flet. c. 4.

Johan. Salisbur. Polycrat. l. 8. c. 22.

Seld. ad Flet. ubi supra. c. 7.

Johan. Salisb. ubi supra.

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their zeal, omitted no opportunity of bringing into practice both the principles and forms of the civil law to the exclusion of the common law, particularly in the ecclesiastical courts, where, after the separation of the ecclesiastical and secular jurisdictions, they continued to practise and preside. So, likewise, in the courts of Chancery, and of the Universities, and the court of Chivalry, and the Admiralty, where, as the clergy had the principal influence and management, their proceedings were modelled after the civil law.

Ante, p. 18.

As to the canon law, we have seen how far the Saxons were disposed to admit of such canons or rules as had been thought necessary by the fathers, for maintaining the doctrine and discipline of the Christian church. Since that period numerous accessions had been made by the popes to the laws and constitutions by which the church was governed. These were first collected by Ivo de Chartres, in the reign of Henry I., and afterwards enlarged and digested by Gratian, a Benedictine monk of Bologna, and published under the title of *Decretum Gratiani*. This work acquired much reputation, and contributed, together with the increasing influence of the pope, to the admission of the canon as well as the civil law into our courts, subject, however, to such restrictions as were imposed upon them by the courts of common law.

Comparison between the civil law, canon law, and common law.

Between these three codes, there are several points of difference entitled to notice in treating of English law. The civil law favoured the prerogatives of the crown. The canon law asserted the claims of the pope as well as the rights of princes. The common law favoured the pretensions of the people in certain particulars. It was a favourite maxim in the civil law, "Quod princeps placet, legis habet vigorem," not in the absurd sense attached to it by some, that the arbitrary capricious will of the prince was law, but that the sole legislative power was vested in the prince, uncontrolled by any other power. By the civil law, natural children, whose parents afterwards intermarried, became legitimate, and might inherit; but by the common law they always remained

Domat's Civ. Law. Taylor's Elem. of Civ. Law, passim.

bastards, and were incapable of being heirs. As the canonists adopted this maxim of the civil law, the clergy were very strenuous in their endeavours to get it adopted into the common law, but with how little success, will appear hereafter. In other respects the civil law was more severe against bastards than the common law; for by the former, bastards begotten in adultery or incest, could not claim so much as a maintenance from either father or mother. By the civil law, if a slave after enfranchisement proved ungrateful, he might be reclaimed by his late master; but by the law of England, when a villein was once made free, he was always free.

The civil law was, in several particulars, less favourable to women than the law of England, as that they could not hold public offices, they could not be surety for another, could not be witnesses to a will, nor guardians, except to their own children, nor arbitrators, &c. On the other hand, by the civil law, a woman might give, buy, and sell, without the consent of her husband; so likewise, neither the husband nor the wife were affected by the debts, contracts, or injuries, of each other. The common law differs in all these particulars, considering man and wife to be one flesh.

The civil law required the consent of father or mother to render a marriage valid; neither the common law nor the canon law nullify marriages for want of consent. The common law and the canon law allow of no dissolution of marriage, but by reason of adultery; by the civil law it is otherwise.

By the civil law the father had a property in whatever his son acquired, and such was the law of Henry I.; but it was afterwards otherwise by the law of England. By the civil law, the minor had a tutor or guardian for his person, and a curator for his estate, and the guardianship was committed to the next in blood, or to him who was to take by inheritance, in case the orphan died. By the law of England, on the contrary, the guardianship was given to the next of kin to whom the land could not descend, for it was a maxim of

LL. Hen. I. c. 70. Bract. l. 2. c. 5.

Fort. de Laud. Leg. Angl. c. 44.

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the law, that to commit the care of the minor to him who is next heir at law, is "quasi agnum lupo committere ad devorandum."

By the civil law, guardians were frequently appointed by the magistrates, and probably from this arose the practice in the ecclesiastical courts of occasionally appointing guardians for the personal estate and person, when there were no other guardians either by tenure or otherwise.

The canon law differs from the civil law, in reckoning degrees in the collateral line; for by the former, in whatever degree the persons are distant from the common stock, in the same degree they are distant from each other: thus, my brother and I are but one degree distant from each other, because we are distant but one degree from our father, the common stock whence we sprung; but by the civil law we are said to be two degrees, because the rule of civilians is, that there are as many degrees as there are persons begotten, not reckoning the common stock from which all descend. The common law computes degrees after the manner of the canon law.

As to the succession to the estates of intestates, it appears thât the civil law had no regard to primogeniture, nor showed any preference to males before females, in which two points it differed from the common law at this period, and still more so hereafter.

The trial by jury is unknown to the civil law, the office of deciding from the evidence belonging exclusively to the judge. This is a grand mark of distinction between our common law courts and those in which the proceedings are according to the civil law, as the Ecclesiastical Courts, the Chancery, and others. It must not, however, be forgotten, that the canons or constitutions of the English church favoured this trial, as appears from the law of Henry I. before cited, where, in criminal cases, this course of proceeding was recommended by the clergy.

Ante, p. 55.

By the civil law, counsel were not allowed to notorious criminals, nor by the law of England at that period, and long

after; but this has since undergone a change in some respects.

The depositions of witnesses were taken in writing, according to the forms of the civil law, but the proceedings of the common law courts were, probably, at all times conducted *vivâ voce*. The charge against a person in the civil law was, and is, called the libel; the summons a citation; the pleading *litis contestatio*, &c. What has here been said on the subject of the civil and canon law, will suffice for the present to show in what manner, and to what extent, they obtained admittance into this country at the period we are now treating of.

CHAPTER VIII.

HENRY II.

Charter of Henry I. confirmed.—Feudal System established.—Foreign Codes of Feudal Law.—Lex Salica.—Lex Longobardorum.—Capitularia.—The Grand Coutumier.—Assises de Jerusalem.—Liber Feudorum.—Feudal Law in England and Scotland.—Glanville.—Regiam Magistatem.—Dialogus de Scaccario.—Liber Niger and Liber Ruber.—Law of Landed Property since the Conquest.—Baronies.—Knight's Fees.—Knight's Service.—Socage Tenure.—Incidents to Knight's Service.—Homage.—Fealty.—Warranty.—Wardship.—Marriage. Reliefs.—Heriots.—Aids.—Escheats.—Incidents to Socage Tenure.—Sergeantics.—Escuage.—Frankalmoigne.—Villenage.—Dower.—Maritagium.—Curtesy of England.—Succession and Descent.—Impediments to Descent.—Alienation.—Attornment.—Mode of Conveying Lands.—Livery of Seisin.—Charters.—Chirographs.—Indentures.—Final Concord or Fine.—Feoffment.—Confirmation.—Release.—Demise.—Testaments.

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Charter of Henry I. confirmed.

HENRY II., who is described by historians as a prince of great wisdom and virtue, contributed more than any before, or perhaps after him, towards the improvement and methodizing our law. As the establishment of the Saxon laws was at that period a matter of great moment, his first step on his accession to the throne was to confirm the charter of Henry I. and to enjoin that "Leges Henrici avi sui inviolabiter observari." At the same time as the rights and interests of men were now much more diversified and complicated than in the time of the Saxons, new laws sprung up or were formed by express enactment, to meet the circumstances as they arose.

The feudal system was now in full force in England as well as in other countries of Europe, and different codes of laws founded on these principles were now extant. Among the foreign codes, the principal are the Lex Salica, Lex Longobardorum, the Capitularia, the Assises of Jerusalem, the Liber Feudorum, and the Grand Coutumier.

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Foreign codes of feudal law.

The *Lex Salica*, or the Salique Law, is so called from the Salians, a people of Germany, who passing the Rhine, under their king Pharamond, settled in Gaul, and first formed a code of laws. Of this code there are two editions, namely, one printed in 1557, and the other subsequently, comprehending the various alterations and additions of Cloris, Childebert, Clotaire, Charlemagne, and Louis le Debonnaire. The most remarkable law in this code, is that which regards the succession "De terrâ vero Salica nulla portio hæreditatis transit in mulierem, sed hoc virilis sexus acquirit, hoc est filii in ipsa hæreditate succedunt." By the construction of this law, females have since been excluded from the throne of France. What is here understood by *Salica terra*, was land granted by the king in reward for eminent services, and subject to military aid. Sir Henry Spelman observes, that some of the laws of Henry I. were derived from this source.

Lex Salica.

Otto Frising. l. 4. c. 32. Du Cange, Gloss. in Voc. Lex.

Spelm. Gloss. ad Voc.

The *Lex Longobardorum*, or the Law of the Lombards, is the next code in point of antiquity and importance, which contains more evident traces of the feudal polity than most others. This survived the destruction of that kingdom by Charlemagne, and is said to be still in force in some parts of Italy.

Lex Longobardorum.

The *Capitularia*, or Capitularies, so called from the small chapters or heads into which they were divided, was a collection of the laws promulgated by Childebert, Clotaire, Carloman, Pepin, Charlemagne, and other kings. The best collection of these laws is said to be that of Angesise, abbot of Fontenelles, published in 817. Of the subsequent editions, that by Baluze, in 1677, is reckoned the completest.

Capitularia.

The *Grand Coutumier*, or the Coutumier of France, is a

The Grand Coutumier.

collection of the customs, usages, and forms of practice, which had been in use from time immemorial in the kingdom of France. It was first projected by Charles VII. in 1453, but was not completed until 1609. This Grand Coutumier consisted of the Coutumiers or collections of the customs of different provinces, as the Coutumier de Paris, the Coutumier de Normandie. The Coutumier de Normandie, also called the Grand Coutumier de Normandie, has a peculiar interest for the English reader, on account of the affinity observable therein to the feudal jurisprudence of our own country. It was composed about the fourteenth of Henry II., in 1229; and consequently contains, as Sir Matthew Hale observes, the laws of the Normans, not as they stood before the conquest, but long after: from which circumstance, and many others, he concludes that they borrowed very much from our laws; at the same time he supposes that the imitation was reciprocal. In fact, this appears so natural, from the close intercourse that subsisted between the two people living under one sovereign during so many reigns, that we should suppose it impossible to be otherwise. It is not necessary to trace the office of sheriff, or the trial by jury, &c. from the Normans, as we have made it clear that they were, in the principal points, of Saxon origin. On the other hand, it is probable, that the feudal system, at the Conquest, had made some few advances in Normandy beyond what it had done under the Saxon kings, although it is clear that the law was not settled at that period, either in Normandy or elsewhere. The edition of the Coutumier de Normandie, by Basnage, which appeared in 1678, is the most esteemed.

Hale, Hist. Com. Law. c. 6.

Assises de Jerusalem.

The Assises de Jerusalem, is among the number of the most ancient collections of feudal jurisprudence. It was made at a general assembly of lords after the conquest of Jerusalem, and was formed principally from the laws and customs of France.

Liber Feudorum.

Of all the works on the feudal law of other countries, that entitled *Liber Feudorum*, or the Book of the Feuds, is of the highest authority. It was compiled by the emperor

Barbarossa in 1170, and published at Milan. The gloss of Columbinus upon it, which has been highly esteemed, is frequently printed with it; particularly the edition which was revised by Minucius de Prato Vetero, which received the confirmation of the emperor Sigismund, and afterwards of the emperor Frederic III. What has been said on the feudal jurisprudence of other countries may not be uninteresting to the reader who wishes to trace the progress of English law, and know the sources from which it is derived.

Butler's Notes to Hargrave's edit. of Coke's Institutes.

Feudal law in England and Scotland.

Glanville.

On the laws of England and Scotland, two treatises are extant. One was written by Ranulph de Glanville or Glanvil, chief justiciary of England to Henry II., who was much in the confidence of his sovereign, and served him, as is supposed, in the different capacities of soldier, statesman, and judge: "Cujus sapientia," observes Hoveden, "conditæ sunt leges subscriptæ, quas Anglicanas vocamus." His work was entitled, *Tractatus de Legibus, et Consuetudinibus Angliæ,*" and was probably composed at the express command of the king; for, in the Cottonian collection there is also a MS. of Glanville, which bears the title of "Laws of Henry the Second." It was first printed at the instance of Sir Wm. Stamford. The distinguished author of this book, after having enjoyed the confidence of his royal master until his death, assumed the Order of the Cross, and perished, valiantly fighting at the siege of Acre in 1190.

Hoved. 600.

Mad. Hist. Excheq. 123.

Bridgeman's Leg. Bibl. Co. 4. Inst. 345.

Mad. Hist. Excheq. 87.

Regiam Majestatem.

The second treatise referred to, is on the laws of Scotland, and is entitled *Regiam Majestatem*, because it commences with the words *regiam majestatem*, in the same manner as Glanville commences his work with the words *regiam potestatem*. The many points of resemblance between this work and that of Glanville put it beyond all doubt that the one was copied from the other, but to which the merit of originality is to be ascribed has been made a matter of dispute. Suffice it here to observe, that the Scotch work bears the marks of having been written with the view of illustrating our author; and this, coupled with the cir-

cumstance that in Skene's collection of Scotch laws, which follow the *Regiam Majestatem*, several laws are taken from English statutes of prior date, it is pretty clear that a considerable part of the Scotch jurisprudence was borrowed from ours.

Dialogus de Scaccario.

There are, besides, some smaller treatises on the English law of this period that are entitled to notice, namely, the *Dialogus de Scaccario*, the *Liber Niger*, and the *Liber Ruber*. The *Dialogus de Scaccario*, a treatise on the Court of the Exchequer, is ascribed by some to Gervasius Tilburiensis, and by others to Richard Fitz-Nigel, bishop of London, who succeeded his father as treasurer in the reign of Richard I. It is quoted by Lord Coke under the name of Ockham, and is to be met with at the end of Mr. Madox's History of the Exchequer. A translation has since been printed, under the title of "A Dialogue of the Exchequer."

Liber Niger and Liber Ruber.

The *Liber Niger* and the *Liber Ruber* are two miscellaneous collections of charters, treatises, and conventions; the former of which is ascribed to Gervasius Tilburiensis, and the latter to Alexander de Swineford, archdeacon of Shrewsbury, and an officer in the Exchequer. At the latter end of Henry the Second's reign, Hearne printed the *Liber Niger* with some other things in two volumes,under the title of *Exemplar vetusti Codicis MS. nigro Velamine cooperti in Scaccario*, &c.

Nicholson's Hist. Lib. 17. Bridgeman's Leg. Bibl.

Law of landed property since the Conquest.

As to the law of landed property, it had probably undergone a greater change since the Conquest than it did at that period, when it appears to have changed more in language than in principles.

The thanes of the Saxons were, as before observed, called by the Norman appellation of baron, but the office and dignity of both thanes and barons were the same. *Baro*, in the Latin of the middle ages, signified a stipendiary soldier, which was probably derived from the Greek βαρυς, heavy or strong, that is, fit for service. In process of time it acquired the higher signification of a minister of the king, whence it became afterwards appropriately applied to a vassal of the

crown. It was also employed in the sense of a man as distinguished from a woman, and likewise in that of a husband. The term was in use among the Normans, to denote one possessed of a seignory held immediately of the king, with a right of administering justice in criminal and civil matters within his seigniory. In this sense it was used in England at the Conquest, and also at the period we are now treating of.

Barons were divided, according to the extent of their possessions, into *barones majores et minores*, answering to the *thani majores et minores* of the Saxons. The estate, feud, or fee, held by a baron was termed a barony, answering to the *thainland* of the Saxons. That which the baron reserved for himself was named *terra dominicalis*, and that parcelled out to the tenant, *terra tenementalis*, answering to the inlands and outlands of the Saxons.

Ante, p. 9.

Baronies.

Every barony had a capital mansion upon it for the residence of the lord, whence it was called in French *manoir*, in English *manor*, and in the Latin of the middle ages *manerium*, from *maneo*, to remain or reside. A barony, however, sometimes consisted of several manors, the chief of which was called *caput baroniæ*, and the residence thereon *capitale messuagium*. Some baronies were likewise called *honors*, because they were originally given by way of distinction or honour.

Domesday Book, pass. LL. Hen. I. c. 55.

Glanv. c. 17. LL. Hen. I. c. 55. Radulph de Dicet. Ann. 1176.

Every manor, being originally held of the crown, was at first called a barony, whether large or small, and the lord of the manor was called a baron; but, after the distinction was made between the *barones majores et minores*, the latter were simply styled lords of manors, and the manors themselves were distinguished by the name of lordships. The extent of a barony was estimated by the number of knight's fees, which appears to have been different at different times. Mr. Madox cites instances from ancient records, of baronies held by the service of forty, fifty, or even a hundred knights' fees. From a record in the second year of King John, it should seem that a single knight's fee might constitute a

Mad. Baron. Angl. 91.

Knights' fees.

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barony; but, if the Treatise *de Modo tenendi Parliamentum* is to be credited, an earldom consisted of twenty knights' fees, and a barony of thirteen. A knight's fee, called in Latin *feudum militare*, was that estate in land which subjected the person holding it to military service. What was the exact amount of a measure of this land, it is impossible to ascertain: it has been estimated in quantity at twelve ploughlands, and the average value, allowing for the variation of the times, at 20*l.* per annum; but Mr. Selden supposes it was estimated neither by the value nor the quantity of land, but by the quantity of service reserved. A knight's fee therefore, according to his supposition, was as much land as the king was pleased to grant for the service of one knight. Those who held lands of the great barons or lords, were originally all called barons; and some of them retained this appellation after it had become a title of dignity: thus the earls of Chester and the bishops of Durham had their barons, but the lesser barons were sometimes called vavassores.

Seld. Tit. Hon. pt. 2. c. 5. sect. 26.

Co. Lit. 69.

Cruise on Dignit. p. 35.

LL. Hen. I. c. 7.

All who held of a superior lord were now called tenants; and those who held immediately of the king were, by distinction, called tenants *in capite*: that which was holden was termed a tenement, and the manner of the holding a tenure. When any one held under one lord immediately, and under another mediately, the chief lord was called lord paramount, and the inferior lord the mesne lord. Mr. Spelman remarks, that the words tenant, tenement, and tenure, have a purely feudal meaning in their original acceptation; and, as they were unknown to the Saxons, he infers that the feudal system was not in use among these people. If, however, any argument can be drawn from the language of the feudal law as to the time of its commencement, it may, with equal propriety, be inferred, that the feudal system was only partially commenced among the Normans at the Conquest, for this language was not fully introduced even in the reign we are now treating of, and probably came into vogue as the principles of the feudal

Spelm. Feud. c. 3.

law developed themselves in practice, and gained a regular footing.

The word knight, from which the principal tenure derives its English name of knight's service, is a term purely Saxon, and also military in its original signification. *Knight* in Saxon, and *knecht* in German, both denoted originally a soldier, or military man; and in the present day the Germans use the word in the same sense, as the *landesknecht*, or militia, &c. It was probably used among the Saxons much in the same sense as it was afterwards by the English, to denote one performing military service for a superior lord; for we find that when the *hus-carls* or military retainers of the Saxon kings, obtained a grant of, or otherwise acquired five hides of land, they rose to the rank of a minor thane. This grant of land being charged with military service, became what was afterwards termed a knight's fee. In all other languages, except the English, the name for a knight is derived from that of the horse, or something connected with it, as the Latin *eques*, the French *chevalier*, the Spanish *cavalleros*, the German *ritter* a rider, &c.

Jud. Civ. Lund. apud Wilk. p. 71.

Knight's service.

Knight's service was at this time distinguished in Latin by the name of *servitium militare;* in French, *service du chevalerie*. In the charter of Henry I., those who held by knight's service, were called "milites qui per loricas terras suas defendunt," answering to the *fief d'haubert* of the Normans.

Socage tenure.

Socage tenure, the next principal tenure, was distinguished by that name in this day. Socage, in the Latin of the middle ages *socagium*, is mostly derived from the Saxon *soc*, a plough, denoting properly plough-service, answering to the *fief de roturier* of the Normans. It may, with equal propriety, be derived from *socne*, a franchise, or liberty; for socage tenure was characterized for its freedom, being a more independent, though less honourable tenure, than that of knight's service. The sokemen were the husbandmen, or freemen, among the barons, and socage tenure was now called a frank or free tenure.

Somn. on Gavelk. 138.

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Incidents to Knight's service.

The incidents or obligations by which these two tenures were distinguished from each other were distinctly known and marked out in this day. The incidents to knight's service were homage, fealty, warranty, wardship, marriage, reliefs, heriots, aids, escheats, and forfeiture.

Homage.

Glanv. l. 9. c. 1. Reg. Maj. l. 2. Grand Cout. c. 126.

Homage, in Latin *homagium*, was a service of submission paid by the tenant to the lord; so called from *homo*, a man, because in performing it the tenant said, "I become your man, that is, your servant." When the tenant did homage to his lord, he was to be ungirt, and his head uncovered. The lord was to sit, and the tenant to kneel, holding his hands together between his lord's hands, and say, "I become your man from this day forward for life, for member and for worldly honour, and unto you shall be true and faithful, and bear you forth for the lands that I hold of you, saving the faith that I owe to our sovereign lord the King." This latter clause is said to have been introduced by order of the emperor Frederick Barbarossa, in all cases where homage was performed to a subject. When homage was done to the king, it was accompanied with the oath of allegiance, whence it was denominated *homageum ligeum*, and subjects were called liege subjects.

Litt. Hist. Hen. II. vol. 3. p. 111.

Homage was taken of every tenant as he came to his land or fee, but women mostly performed homage by their husbands. Bishops did not perform homage, but fealty. It is worthy of observation, that homage remained in force between lord and tenant as long as the heirs of both parties continued, which, in process of time, gave rise to the tenure called *homage auncestrel*.

Fealty.

LL. Hen. I. c. 5.

Fealty, contracted from fidelity, was the oath taken by the tenant at his admittance, who swore to be true to the lord of whom he held the lands. It differed from homage in several particulars. It was incident to all kinds of tenures, and was used at the first creation of feuds, when they were held at the lord's pleasure or for life; but homage was properly incident to knight's service, because it concerned actual service in war, and was probably not introduced until

feuds became hereditary. Homage was performed kneeling, but the oath of fealty was taken standing; besides, in doing simple homage as to a private person, the tenant was not sworn. Homage is supposed not to have existed in the time of the Saxons, but was introduced at the Conquest.

Spelm. Feuds and Ten. c. 3.

Homage and fealty were obligations on the part of the tenant; but warranty, which was an obligation on the part of the lord, arose from the relations contracted between the parties, for Glanville lays it down as a rule, "Quantum homo debet ex homagio, tantum illi debet dominus præter solam reverentiam." This mutuality of obligation was recognised by the feudal laws of other countries. If land was given for the homage and service of the tenant, and a third person instituted a suit for that land, so that the tenant was evicted out of the feud, the lord was bound to warrant the land to the tenant, or to give him a *competens excambium*, an equivalent in value. Warranty, like the words guarantee and guard, comes from the old German *währen*, to look after, in the sense of protecting and defending. Sir Henry Spelman derives it from *war*, signifying arms or defence.

Warranty.

Glanv. l. 9. c. 4.

Assis. de Jer. c. 99. Cout. de Beauv. c. 58

Cowel. Interp. Spelm. Gloss. ad Voc.

Another obligation, which sprung from feuds becoming hereditary, was that of wardship. So long as the heir to a tenant was under age, that is, under the age of twenty-one, being a male, or of fourteen being a female, the lord was entitled to the custody both of the body and of the land; during which time, he might present to churches, and take all other profits belonging to the minor and his estates, having the same absolute control over them as if they were his own. This was, however, to be done with such moderation as not to cause any disseisin. The lord was bound to maintain the heir in a manner suitable to his dignity and the extent of his inheritance, and to restore it discharged from all debts, so far as the estate and the length of the custody would admit. This feudal doctrine, which was now fully established, corresponds with that laid down in the Grand Coutumier and the Regiam Majestatem. Wardship,

Wardship.

Glanv. l. 7. c. 9.

Grand Cout. c. 33. Reg. Mag. l. 2. c. 42.

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which in Normandy was called *garde noble*, did not prevail to the same extent in other parts of France as there.

It appears to have been introduced into England by the Conqueror, but was not a settled part of the feudal system until some time after. Henry I., by his charter, permits his barons to choose their own guardians for their children, this was in conformity with a law of Canute.

LL. Can. c. 72.

Marriage.

Glanv. l. 7. c. 12. Litt. Hist. Hen. II. 104.

If the heirs were females and minors, they were to remain in the custody of the lord until they were married, by his advice and consent; and if a tenant married his daughter, who was an heiress, without the assent of the lord, the law as it now stood, subjected him to forfeit his inheritance; but, on the other hand, the lord could not refuse his consent without assigning a reasonable cause. It appears also that widows were bound to ask the consent of their warrantor if they wished to marry again, and on failing so to do, might lose their dower, but they were not to be compelled to marry again. This was the law of other countries as well as of England, but it does not appear that this feudal burden had yet reached its height. Glanville makes no mention of any money being taken for the consent of the lord; and as Henry I., in his charter, expressly promises to take nothing for his consent, and recommends his barons to do the same, it is most probable that it was not yet become a settled practice in law, although it became so shortly afterwards. Besides, Glanville expressly confines this claim of lords to the marriage of female heirs, which was extended in the reign of Henry III., also to that of heirs male. By the law of Canute above-mentioned, it was enacted, "that no man shall constrain either woman or maid to marry otherwise than where they will, nor shall take any for them, unless by way of thankfulness some do give somewhat." It is evident, from the above, that the practice of taking money for the marriage of wards, which was prohibited by this law, had begun to creep in among the Saxons, and being afterwards encouraged by the Conqueror, was, in process of time, established.

Assis. de Jerus. c. 187. Grand Cout. c. 33.

Ante, p. 51.

Litt. Hist. Hen. II. 296. Bract. 88. 2 Comm. 70. Sullivan's Lect. p. 130.

Spelm. Ten. p. 29.

Relief, called in Domesday Book *relevium* or *relevatio*, is a French word, derived from the Latin *relevare*, to relieve or take up that which was fallen, because it was a sum of money paid by the tenant or vassal, when he was of age, whereby he relieved or raised up his lands, after they had fallen into his lord's hands by reason of wardship. A relief was called reasonable, which was according to the custom of the realm. The relief of a knight's fee was considered reasonable at a hundred shillings. As to baronies, Glanville says nothing was fixed, because barons holding of the king *in capite*, were accustomed to pay reliefs according to his pleasure and indulgence.

Reliefs. Bract. fol. 84. Co. Inst. 76. a.

Glanv. l. 9. c. 4.

The heriot, which was an obligation that existed among the Saxons, has sometimes been confounded with the relief, but it has been shown by Bracton, a writer in a subsequent reign, to be a distinct thing, the heriot being a voluntary present, made by the tenant at his death to his lord, of his best beast, or his second best, according to the custom of the place. It had not, like the relief, any respect to the inheritance.

Heriots. Ante, p. 9.

Bract. Fol. 86.

Aids, *auxilia*, were rendered by the tenant to the lord, for the purpose of aiding and assisting him, as the term imports, on particular occasions. These were to make his son and heir a knight, to marry his daughter, to pay his lord's debts, and to redeem him from captivity. These aids were originally considered as matter of grace rather than of right; being, as Bracton terms them, customs, not services, and personal, not prædial; that is, they had respect to the person of the tenant, and not to the fee. They were at this time still optional as to the amount, but it appears that a lord might distrain for the above-mentioned aids, which were termed reasonable. Whether they might distrain their tenants for aids to carry on their wars was, in his time, a matter of doubt, although the prevailing opinion was that they could not. Mr. Madox informs us, that King William the First took 6*s*. of each hide throughout England, and Henry the First took 3*s*. for each hide, as aid *pur fille marier*.

Aids.

Glanv. l. 9. c. 8.

Bract. fol. 36. Glanv. ubi supra. Dalrymple on Feuds. 52. Wright's Ten. 40. Hargrav. Notes to Co. Lit. 76. a.

Mad. Hist. Excheq. c. 15.

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This feudal burden was doubtless introduced into England by the Conqueror; but in all probability it took its rise from a similar practice, which, as Mr. Justice Blackstone observes, prevailed among the Romans; the patron being entitled to three aids from his client, namely, to marry his daughter, to pay his debts, and to redeem his person from captivity.

2. Comm. 63.

Escheats.

Escheat, from the French *eschoir*, to fall incidentally, was the casual descent of lands and tenements to the lord *propter defectum sanguinis*, that is, when the tenant died without heirs; which was a part of the feudal system in every country.

Glanv. l. 7. c. 17. Lib. Feud. l. 2. tit. 86.

Lands also reverted to the lord by forfeiture for various causes, as for felony, conviction of theft, and outlawry. If any one holding of the king *in capite* were an outlaw or convicted, his land, as well as his tenements and chattels, were taken for the king's use. If such felon or outlaw held of any other but the king, then all his chattels belonged to the king, and his lands were to remain in the hands of the king for a year and a day, at the expiration of which period, the land was to revert to the lord of the fee, but not until the king had thrown down the houses, and rooted up the trees, which was afterwards denominated the year, day, and waste. How far this law accorded with that of the Normans, may be seen by reference to the Grand Coutumier.

Glan. ubi supra. Lit. Hist. Hen. II. 118. Co. 2. Inst. 36. Robins. on Gavelk. 284.

Grand Cout. c. 24.

Glanville mentions several other grounds of forfeiture, arising from the act of the tenant contrary to the obligation he owed to his lord, as the marrying his daughter without the consent of the latter, or the doing any thing to the disinherison or injury of the lord; all which was in accordance with the feudal law of other countries. But there was one peculiarity in our law, which is worthy of notice, namely, that if female heirs were guilty of incontinence before marriage, they lost their inheritance. The reason for which severity, Lord Littleton supposes to have been the loss which the lord might sustain by being deprived, through her dishonour, of the marriage of his ward. This is the more probable, as widows were not subject to the same penalty.

Glanv. l. 9. c. 1. Lib. Feud. l. 2. tit. 23, 24.

Glanv. l. 7. c. 12.

Lit. Hist. Hen. II. 119.

Incidents to socage tenure.

The incidents to socage tenure differed in some few particulars from those above mentioned. The relief due upon socage tenure was one year's value of the land, as settled by a law of the Conqueror. But this was payable even though the heir was under age; whereas the relief of the knight's fee was only payable if the heir at the death of his ancestor was of full age. The heirs of sokemen were, upon the death of their ancestors, to be in the custody of their *consanguinei propinqui*, with this qualification, that if the inheritance descended *ex parte patris*, the custody belonged to the descendants *ex parte matris*, and *vice versa*; for the maxim of the law was, that the custody of the person should not belong to one standing so near the succession, as before observed in speaking of the civil law. So it is expressed in the law of Henry I: "Nullus hæredipeta sui propinqui vel extranei periculosæ sane custodiæ committitur." Among the Saxons, it appears to have been usual to commit the custody of the person to the mother, and that of the estate to the nearest kin, until the child was ten years of age. By a law of Ina, six shillings were to be given to the mother to enable her to bring up her child; a cow in summer, and an ox in winter.

LL. Gul. I. c. 40.
Glanv. l. 9. c. 4.

LL. Hen. I. c. 70.

LL. Hloth. c. 7.

LL. Inæ, c. 38.

Burgage tenure, and tenure in gavelkind, were both of them species of socage tenure, differing in regard to the modes of the descent of lands.

Sergeanties.
Escuage.

As lands were, in course of time, granted for other besides military services, tenures were varied on that ground. Of this description were the two kinds of sergeanties, which are only alluded to by Glanville; also the tenure by escuage or scutage, which was a commutation of a money payment for personal service, that is said to have commenced in the fourth year of this king's reign, when he published an ordinance, that such of his tenants as would prefer to pay him a certain sum should be exempted from attending him either in person, or by deputy, in the expedition he then contemplated to Thoulouse.

Chron. Nor. p. 995.
Spelm. Cod. Vet. apud Wilk.
LL. Anglo-Sax. p. 321.

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Frank-almoigne. Glanv. l. 7. c. 1. Grand Cout. c. 32.

There was another tenure of a spiritual nature, to which Glanville alludes, namely, the tenure by frankalmoigne or freealms, as it was afterwards called, whereby a religious corporation, sole or aggregate, held lands to them and their successors for ever, *in liberam eleemosynam*, or *freealms*, for which no other service was required than prayers, and other religious exercises, for the good of the donor's soul.

Villenage. Glanv. l. 5. c. 6.

Although Glanville makes no mention of villenage as a tenure, yet he speaks of it as a condition. Of villeins, those were called *nativi* or villeins born, who were such *à nativitate*, as when one was descended from parents both villein born. The same, it seems, might be said in that day where the father was free and the mother a villein born, namely, that the issue would be villeins according to the rule of the civil law, "partus sequitur ventrem," that is, follows the condition of the mother. A law of Henry I. says otherwise: "semper à patre non à matre generationis ordo texitur;" and this became afterwards a rule of English law.

LL. Hen. I. c. 77. Fortesc. de Laud. Ang. c. 42.

Villeins born were in as absolute a state of slavery as they had ever been in the time of the Saxons; being not only divested of all property, but of almost all civil rights; insomuch that if a man married a *neif*, that is, a woman villein born, he thereby lost his *lex terra*, or his rights as a freeman. No one in a state of villenage could purchase his freedom; for if he did, he could be reclaimed by the lord, by the rule of the law, that "quicquid per servum acquiritur, id domino acquiritur."

Glanv. ubi supra.

Bract. fol. 25.

Nevertheless there were many modes of enfranchisement, by which a man in a state of villenage might be made free. A lord might release his villein from all his own claims as well as those of his heirs, or the lord might give or sell him to another for the purpose of having him liberated. This act of enfranchisement was, in ancient times, and before writing was common, accompanied with much ceremony and publicity: "Qui servum suum liberum facit in ecclesia vel mercato, vel comitatu, vel hundredo, coram testibus et

Glanv. l. 5. c. 5.

LL. Edw. Conf. c. 35.

palam faciat, et liberas ei vias et portas conscribit, et lanceam et gladium, velque liberorum arma in manibus ponat." When writing became common, villeins were enfranchised by the lord's deed.

But although a man might make a villein free as far as concerned his own claims and those of his heirs, yet he could not put him in a condition to be considered so by others; for if a freed man was brought into court to make proof against a stranger, or to wage his law, it might be objected to him that he was born a villein; and the objection was held good to disqualify him, even although he had been knighted previous to his having been enfranchised, except he received his liberty with the licence of the king. According to a law of William the Conqueror, which was in force in this day, if a villein remained peaceably a year and a day in any privileged place, so as to be received into their community or guild as a citizen, he became *ipso facto* free: so also says the Regiam Majestatem. If, however, as Bracton observes, the lord "clameum suum qualitercunque apposuerit," this privilege would not avail him. Thus we see the degraded condition in which villeins were kept even in these times, although, according to that writer, villeinage was rising into a sort of tenure, of which more will be said hereafter.

Glanv. l. 5. c. 5.

LL. Gul. I. c. 66. Reg. Maj. l. 2.

Bract. l. 1. fol. 6.

Connected with the subject of tenures were some other incidents, in respect to landed property, and property in general, which were come into notice. These were dower, maritagium, descents, alienation, and testaments.

Dower.

Dower, called by the foreign feudists *doarium*, is derived *ex donatione*, and was equivalent to *donarium*. The term *dos* signified among the Romans, who knew nothing of endowing their wives, the marriage portion which the wife brought to the husband, whence Tacitus remarks it as a singularity among the Germans, "Dotem non uxor marito sed uxori maritus affert." Although dower was unknown to the Romans, yet we have the authority of Scripture for the use of it in the earliest ages of the world. The practice prevailed among the Grecians, until, by a refinement of

Tac. Germ. c. 18.

Gen. 34. 2.

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manners, they began to look upon it as disgraceful. Whence Aristotle reckons it as one proof that the manners of the ancient Greeks were barbarous, because they bought their wives.

Polit. l. 2. c. 8.

On the establishment of the feudal system, dowries became universal, but they varied in quantity in different countries. The Goths did not allow dower to exceed a tenth. The Saxons, on the continent, allowed the wife the half of what the husband acquired, besides the dower which was assigned to her at the marriage. The assises of Jerusalem assigned a half, but the Lombards only a fourth. A law of Edmund gave a half, provided the widow did not marry again. The laws of Henry I. allowed a woman a third for her dower; which corresponded with what was allowed by the Sicilians and Neapolitans, and after them by the Normans and Scotch.

Lindenb. Cod. Antiq. LL. Wiseg. l. 3. tit. 1. LL. Sax. tit. 8. Assis. de Jerus. c. 187. LL. Longob. l. 2. tit. 4. LL. Edm. c. 2. apud Wilk. LL. Hen. I. c. 70. Grand Cout. de Norm. c. 102. Reg. Maj. l. 2. c. 16. Glanv. l. 6. c. 1.

Glanville speaks of two kinds, namely, the dower *ad ostium ecclesiæ*, and dower *ex assensu patris*. The first was the common kind of dower; and where a man endowed his wife at the church door without naming the amount, she was entitled to her *dos rationabilis*, which by the common law was one-third. If the husband named a dower which exceeded a third, it was to be admeasured to the third; for although the law permitted a man to give less, it would not suffer him to give more; and although the husband subsequently made great acquisitions to his estate, the wife was not entitled to more than the third part of such land as he held at the time of endowment. The same rule prevailed, if a man endowed his wife with his chattels and other things, or even with money; and as a general principle, if a woman was satisfied with the extent of the endowment at the church door, she could never afterwards claim as dower any thing beyond it, which doctrine corresponds with that laid down in the Regiam Majestatem and the Norman code.

Dower ad ostium ecclesiæ.

Glanv. l. 6. c. 2.

Glanv. ubi supra. Reg. Maj. l. 2. c 16 Grand Cout. de Norm. c. 102.

Dower *ex assensu patris* was, when a son endowed his bride with some part of his father's lands, with the consent of

Dower ex assensu patris.

the latter. Glanville states a doubt here, whether in such case she could demand more than the particular land assigned; and whether, upon the death of the husband before the father, he was bound to warrant her in the possession of it. The Regiam Majestatem answers this question, by saying that the father of the husband was compelled to warrant her. By the law of Normandy she could claim no dower if the father or grandfather of the husband did not actually consent to the marriage.

Glanv. l. 6. c. 17. Reg. Maj. l. 2. c. 16. Grand Cout. de Norm. c. 102.

In the assignment of dower, the capital messuage could form no part, because that could not be divided, but must remain entire to the heir, a point of feudal law which does not appear to have existed in the time of the Saxons, for by a law of Canute, a widow was not to be turned out of the residence where she had lived with her husband. In Glanville's time it was customary to assign land to a woman as her dower where there was a residence.

Glanv. ubi supra.

LL. Can. c. 70. Glanv. l. 6. c. 17. l. 12. c. 20.

A woman could make no disposal of her dower during her husband's life, although he might sell and alien it if he pleased; but if she withheld her consent, and notwithstanding her refusal, her dower was sold, she might claim it after her husband's death, and upon proof of her dissent, might recover from the purchaser.

Glanv. l. 6. c. 31.

A woman might be barred of her dower by being separated from her husband, *ob aliquam sui corporis turpitudinem*, or on account of her relationship and consanguinity; and yet, in both these cases, the children were considered as legitimate, and inheritable to their father. Divorce generally was a bar to dower in the Norman code. By a law of Canute, the infidelity of the wife was punished not only with the forfeiture of every thing she possessed to her husband, but also with the loss of her nose and ears.

Reg. Maj. l. 2. c. 15. Grand Cout. de Norm. c. 102. Glanv. l. 6. c. 17.

LL. Can. c. 50. apud Wilk. Anglo-Sax. 142.

Maritagium, which answered to the *dos* of the Romans, signified the portion which a man gave with his daughter in marriage. This was of two kinds, *maritagium liberum*, and *maritagium servitio obnoxium*.

Maritagium. Glanv. l. 7. c. 1.

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Maritagium liberum was, when a freeman gave part of his land with a woman in marriage, quit of all services to the chief lord. Land so given enjoyed this immunity down as low as the third heir; and, during this interval, the heirs were not bound to do any homage for it, but after the third heir the land was again subject to the accustomed services. When land was given in *maritagium servitio obnoxium*, the husband of the woman and his heirs, down to the third, were to perform all services except homage; but the third heir was to do homage for the first time, and all his heirs after him. In the mean time fealty, instead of homage, was to be performed by the women and their heirs.

Glanv. l. 7. c. 18.
Reg. Maj. l. 2. c. 57.

Curtesy of England.

When a man received lands with his wife in *maritagium*, or as a marriage portion, and had an heir by her, male or female, that was heard to cry within four walls, the maritagium remained to the husband during his life, whether the heir lived or not, but after his death it went to the original donor: this was called *Lex Angliæ*, and afterwards in English the curtesy of England, because the law was principally confined to England, but it was not altogether unknown to the Romans or to the German tribes, and was probably introduced into England by the Saxons, if we may judge from the circumstance that there was a curtesy by the custom of gavelkynd. This differed, however, in some respects from the law here laid down. By the custom of gavelkynd, a man might be tenant by the curtesy without having any issue, but he could have only a moiety of the wife's land, and it ceased if he married again. Curtesy appears also to have obtained in Normandy, with a similar modification in one respect, for the husband held there only during his widowhood. In other respects the Norman code agrees with Glanville. The term curtesy, in the French *courtesie*, Latin *curialitas*, signifying suavity or urbanity, was probably employed in this sense, to denote that this custom sprung from favour to the husband rather than from any right. Others derive it from *curia*, a court; thus tenant by

Glanv. ubi supra.
Reg. Maj. l. 2. c. 58.
Craig. de Jur. Feud. l.2. c.19. s.4.
Lindenbrog. Cod. Antiq. 92.
Hale's Hist. c. 6.
Cout. de Norm. 120. 121.
Co. Litt. 30. a.
Robins. on Gav. l. 2. c. 1.

Du Cange, Gloss. ad Voc. Curialitas.
2 Comm. 126.
Stat. pro Ten. per Leg. Ang.

curtesy signified as much as tenant by the courts of England, that is, by the law of England, *per legem Angliæ*, as it was otherwise called.

Succession and descent. Glanv. l. 7. c. 3.

The doctrine of primogeniture, was one essential part of the feudal system, which was fully established in England at this period. If lands were held by knight's service or military tenure, then, according to the law of the realm, the eldest son succeeded to the father *in totum*, and none of his brothers had any claim whatever; but if the lands were held in socage tenure, and had been anciently partible, then the inheritance was divided among all the sons in equal parts, reserving to the eldest son the *primum fædum*, as it was termed in the laws of Henry I. provided he made an adequate satisfaction to the other brothers on that account. But if the land was not *antiquitus divisa*, then it was the custom in some places for the eldest son to take the whole inheritance, and, in some, the younger. The succession of the lands equally to all the sons was, as before observed, a relict of the Saxon law, which was still retained in Kent, and some other parts, as incident to the tenure in gavelkynd, whence the name is derived by some, as much as to say, *gif eal cyn*, "given to all the children;" but others, with greater reason, derive it from the Saxon *gafel* or *gavol*, a tribute, rent, or service, and *gecynd*, nature, *i. e.* a kind of service. *Gafuel*, in the Welch, signifies to hold, which confirms the supposition that gavelkynd signifies properly a kind of tenure, to which the partibility of the lands was merely an incident. The custom for the younger son to succeed in preference to the elder, was incident to the tenure in burgage, which has been distinguished by the name of borough, English. These two tenures, which existed only partially in England at this period, are merely alluded to by Glanville. The Norman code divides inheritances into impartible and partible; the former of which appears to answer to our law of succession in military tenure, and the latter to that in socage tenure.

Ante, p. 53.

Spelm. Reliq. c. 27. Somner, Tract. de Gav. 42. Robins. on Gav. 24, 25. Lamb. Peramb. p. 545; and Gloss. to Archaionom. Spelm. Gloss. ad Voc. Somn. Gavelk. 24. Taylor's Hist. of Gav. 26.

Grand Cout. de Norm. c. 24. Hale Hist. Com. Law, c. 11.

Glanv. ubi supra.

When a man left several daughters, whether knight or

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sokeman, his inheritance was equally divided amongst them, reserving, however, as in the case of a son in socage tenure, the capital messuage to the eldest daughter. In these divisible inheritances, where one died without heirs, the share of the party deceased was divided among the survivors, also the husband of the eldest daughter was to do homage to the chief lord for the whole fee. But the younger daughters were bound to perform to the chief lord the services due for their shares, by the hand of the eldest daughter or her husband; but they were not bound to perform any homage or fealty to the husband of the eldest daughter in their lifetime, nor their heirs after them in the first and second degrees; but those in the third descent from the younger daughters, were bound to do homage for their tenement to the heir of the eldest daughter, and to pay a reasonable relief. Besides, the husbands could give no part of the inheritance of their wives, nor remit any part of the right of the heir, which corresponds with the custom of Beauvoisis, and was, as Mons. Thaumas supposes, borrowed by us from that quarter.

Beame's Notes on Glanville, l. 7. c. 3.

Spelm. Gloss. ad Voc. Lex.

If a man had more wives than one, and had two daughters from two, and at length a son from a third, this son would alone take the inheritance by a rule in the Salic code, which was now engrafted into the feudal system of most countries: "Quod mulier nunquam cum masculo partem capit in hæreditate aliqua," unless, says Glanville, by the particular custom of any place, which was at this time respected. But when a man had several daughters by different wives, they were all equally entitled to the inheritance of the father. This was, however, to be understood according to the Regiam Majestatem, of the father's heritage descending from him to them; for if the heritage descended and came of the mother's side, each daughter succeeded to the inheritance of her own mother. "Whence," observes Sir Matthew Hale, "the law of descent, in this particular, was the same as now, namely, of lands descended of the part of the father, it should not revert to the part of the mother, and *è converso*."

Glanv. ubi supra.

Reg. Maj. l. 2. c. 31. Hale's Hist. Com. Law, c. 11.

When a man died without leaving either a son or a daughter, his grandchildren, if he had any, were to succeed him in the same manner as his son or daughters would have succeeded; for it was then the law of succession, as in the present day, that the descendants in the right line were to be preferred to those in the collateral line: thus upon the failure of lineal descendants, the brother and sister and their descendants might succeed. After these, the uncles and aunts, and their descendants; but the father and mother, it appears, were not now by the law of the land to inherit, which was different from the law of Henry I. and the civil law, as before observed. The Norman code agrees with the law of England.

Glanv. l. 7. c. 4.

Ante, p. 53.

Cout. de Norm. c. 25.

If a man left a younger son, and a grandson of the elder, it was then a question whether the uncle or the nephew should succeed, although the better opinion seems to have been in favour of the nephew. If, however, the eldest son had been frasfamiliated, that is, portioned by his father, then his heirs could claim no more of the inheritance of the grandfather than what had been assigned to their father.

Glanv. l. 7. c. 3.

Impediments to descent.

There were two impediments to descents or hereditary successions in that day, which are not existing at present, namely, leprosy, and a doubtful point of law, which caused much controversy, not only in Glanville's time, but some time after.

Leprosy is not mentioned by Glanville as an impediment, but Sir Matthew Hale says, " I find it pleaded and allowed in the time of King John, and thereupon the land was adjudged from the leprous brother to the sister. But it was necessary that it should be so adjudged by sentence of the church. Leprosy was also an impediment by the Norman law.

4 Pasch. Johann. Hale's Hist. Com. Law, c. 6. 11.

Grand Cout. de Norm. c. 27.

The doubtful point of law which impeded the descent was this: Suppose a man having three or more sons, made a gift to his second son with the consent of the elder, and the second son died in the lifetime of his father and brothers, the question was who should succeed to the inheritance; it was contended that it could not revert to the father, by a

Glanv. l. 7. c. 1.

rule of the feudal law: "Quod nemo ejusdem tenementi simul potest esse hæres et dominus:" and by the force of the same rule, it was also contended that the eldest could not succeed. Glanville, therefore, was of opinion, that the third son was to be preferred.

Bastards.

Bastardy was then as now an impediment to the succession. Bastard, from the French *bas*, low or base, and *stard*, start, *editus*, *ortus*, sprung, signifies literally base born. By the common law of England, no one could succeed to an estate who was not born in lawful wedlock: of course it excluded, contrary to the civil and canon law, all such as were born of parents that afterwards intermarried. Questions of legitimacy were, however, then decided by the rule of the civil law, that "Filius hæres legitimus est, quem nuptiæ demonstrant;" but this rule was not so strictly and invariably adhered to as not to admit of proofs in some cases against the legitimacy of children born in wedlock; as we learn from Bracton, a subsequent writer.

Glanv. l. 7. c. 15. Litt. Hist. Hen. II. 125.

Glanv. l. 7. c. 12.

Bract. 63.

As a bastard could have no heir but of his own body, a question arose on the subject of succession, and the inheritance of bastards. If any one had given land to a bastard, reserving a service or any thing else, and had received homage for it, so that the bastard died seised thereof without leaving issue, it was a doubt in Glanville's time who was entitled by law to succeed to him, as it was supposed that the lord could not, on account of the homage. The Regiam Majestatem holds that none but the king was to succeed. In Bracton's time, however, we find it was decided that the lord was in all cases the *ultimus hæres* of a bastard.

Glanv. l. 7. c. 16.

Reg. Maj. l. 2. c. 52.

Bract. 20.

Alienation.

The restraints on alienation, were an essential and a striking part of the feudal polity. These were of two kinds; such as respected the lord, and such as respected the heir.

In the first ages of the feudal system, the vassal could not aliene the feud without the consent of the lord; neither could he mortgage, or otherwise subject it to the payment of his debts. Hence we learn from the Liber Feudorum, that such alienations having been made contrary to the law of feuds, and having been found extremely detrimental to

Lib. Feud. l. 2. tit. 55.

the military services which were due from the vassals, they were absolutely prohibited by a constitution of the emperor Lotharius, from alienating their feuds without the consent of their lords.

As the consent of the lord was thus rendered necessary, it followed of course that lords made this a source of emolument, by requiring some gratuity for giving their licence, which, by degrees, grew into a regular payment, and gave rise to the practice of fines for alienation.

In this country there was as yet no such restriction on the practice of subinfeudation, for the Black Book of the Exchequer contains various examples of kings' tenants in this reign, creating a vast number of knights' fees to be held of themselves.

Attornment.

But the obligation between the lord and his vassal, was in this as in other respects reciprocal. As the feudatory could not alien the feud without the consent of the lord, so neither could the lord alien or transfer his seigniory without the consent of his feudatory. The tenant was no less interested in the personal character of his lord, then the lord was in that of his tenant; whence sprung the practice of attornment, as it was afterwards called, which was the formal transfer made by the lord with the consent of the tenant, of the homage and services of the latter to another lord.

Lib. Feud. lib. 2. tit. 34.

Du Cange, ad Voc. Attornatus.

Alienation in respect to the heir, was even less restricted than in the reign of Henry I. A man might alien his inheritable land under certain restrictions; for he might give a portion with his daughter in maritagium, as before observed, with or without the consent of his heir; nay, as Glanville observes, though the heir expressly dissented from it, and forbad it. So likewise every one might give a certain part of his freehold estate to whomsoever he pleased, either in remuneration for his services, or to a religious house in frankalmoigne; nay indeed, it should seem, that a man might also make a gift to his bastard, although the Regiam Majestatem and the Grand Coutumier, which were probably posterior to Glanville, both differ from him in this particular.

Ante, p. 53.

Glanv. l. 7. c. 1.

Glanv. ubi supra.

Reg. Maj. l. 2. c. 19.

Grand Cout. de Norm. c. 36.

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Ante, p. 53.

A distinction was, however, made now as in the time of Henry I. between an inheritance and purchased land. If a person possessed only purchased land, he might make a donation, provided it did not extend to the whole of the lands, to the disinherison of the heir; but if he had no heir, male or female, he had the absolute disposal of the whole, or any part of his purchased lands; and if the person to whom the gift was made obtained seisin of it, no remote heir could invalidate the gift. If a man possessed both inheritable and purchased lands, he was then at liberty to make disposition of the former under the restriction before mentioned, and of the latter as fully and absolutely as if he had no heir.

Reg. Maj. l. 2. c. 20.

Glanv. ubi supra. Grand Cout. de Norm. c. 36.

If a man, having lands in free socage, had many sons, he could not give to any one of the sons of the lands, whether inheritable or purchased, more than the reasonable part which would fall to such son of the whole inheritance; but he could, in his lifetime, give to either of his sons such a part of his inheritable free socage lands, as such son would have been entitled to upon the death of his father.

Mode of conveying lands.

The mode of conveying lands or tenements, had undergone some change since the Conquest, at least as far as regarded the solemnities which accompanied this proceeding. The transferring of possession of lands or tenements from the donor to the donee, which was afterwards distinguished by the Norman appellation of *livery of seisin*, in Latin *traditio*, was to be done either in person or by attorney, and might be performed in various ways, as by delivering of the rings of the door, of a turf, or of any other symbol, answering to the Saxon mode of transfer, *per baculum et cultellum*, before mentioned. Livery was also done by publicly reading the deed, or if by attorney, by reading the letters of attorney in the presence of the neighbours, who were called together for that purpose. This solemnity, as we learn from a writer in a subsequent reign, was of such effect in passing a freehold, that a gift was imperfect without it, being considered in law as a *nuda promissio*.

Livery of seisin.

Bract. 39.

Glanv. l. 7. c. 1.

Charters.

Deeds were now come into general use, and were known, for the most part, by the name of *chartæ*, charters, from *charta*, the paper or parchment on which they were written. They were either royal charters, containing grants from the king to his subjects, or they were private charters, containing gifts or grants from one subject to another.

Reeves' His. i. 88.

Charters were executed with various circumstances of solemnity, as the seal, date, attestation, and direction. Seals were very little, if at all, in use among the Saxons, who were mostly in the practice of affixing the sign of the cross. Edward the Confessor partially introduced the Norman practice of affixing to charters seals of war, which, at the Conquest, became general. This was mostly done by means of a label of parchment or a silk string, fastened at the bottom of the instrument. Charters were not always dated, although they were more generally so after the Conquest than before; but this was the less necessary, as they were mostly executed in the presence of several witnesses, whose names were inserted under the clause of *hiis testibus*. Sometimes charters were executed in open court, after the Saxon manner, and in the presence of a numerous assembly, wherefore we frequently find a long list of witnesses, concluded with the addition *cum multis aliis*. It was not unusual for the king to be a witness to the charters of private men; and in after times, as in the reigns of Richard and John, the king witnessed his own charters, in the words *teste meipso*.

Ingulph. Hist. 901. Mad. Form. Diss. 3. Hick's Diss. Epist. 160.

Hick's Diss. Epist. 29 Mad. Form. Diss. 14.

Reeves' His. i. 90.

As charters were couched in the style of letters, they were variously addressed, according to the circumstances. In royal charters it was sometimes *omnibus hominibus suis Francis et Anglis*; in private charters sometimes *omnibus sanctæ ecclesiæ filiis*; but more commonly *sciant præsentes et futuri*, or *omnibus ad quos præsentes literæ veniunt*, &c.

Chirographs.

Private charters were frequently called *chirographa*, chirographs, from the Greek χειρ, the hand, and γραφω, to write, signifying what was written with a person's own hand. In this kind of charters, it was usual to write the contents

Mad. Form. Diss. 2.

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twice on the same parchment, having the word *chirographum*, or some other word, written in large letters between the two copies, and being afterwards cut in a straight line through the midst of the letters, one would exhibit one half of the capitals, and the other the other half. This practice of cutting in straight lines prevailed as early as the times of the Saxons, and continued until the reign of Henry III., after which it became usual to cut a waving or undulating line, and lastly to cut it indentwise in small notches, *instar dentium;* whence such deeds acquired the name of indenture, which has been retained ever since, although the indented line has been laid aside, and the undulating line only retained.

Indentures.

Among the ancient charters, were final concords, confirmations, releases, exchanges, and conventions, which were not generally distinguished by these appellations until some time after this period.

Final concords or fines.

Final concords, concords, or fines, as they were afterwards called, are particularly mentioned by Glanville, and ranked by him among the pleas moved in the king's court, which, with the consent of the king or his justices, were determined by an amicable composition and final concord. This concord was called final, because *imposuit finem*, it put an end to the matter, so that neither of the litigant parties could ever after recede from it.

Glanv. l. 8. c. 1. et seq.

Mr. Madox supposes that a fine was not, in the strict sense of the word, always an accommodation of a suit, because in many of the most ancient fines, no writ appears to have been sued, nor any process commenced; but, the parties having come to an accommodation, and mutually signed the chirograph, appeared in a court of justice and recognised the concord, whereupon, after the payment of a fine, it was enrolled, and a counterpart delivered to each of the parties.

Mad. Form. Diss. 14.

Some have imagined that this proceeding was derived from the practice of the Saxons, of ratifying their deeds and conventions in open court; but a fine, as Mr. Cruise observes, differed from such a ratification in two material points: in

Plowd. 360.

Cruise on Real Prop. v. 63.

the first place, that nothing appears to have been paid for permission to enter into such agreements; and, secondly, that it was not enrolled in the records of the court. To this it may be added that, whether any suit was actually commenced or not, still it was an accommodation of a dispute between two parties; in all which particulars it agrees with the transactions of the Romans, and was doubtless derived from the civil law. Soon after its introduction into this country, Bracton expressly states, that the proceeding was the same: "Concordia in foro seculari idem est quod transactio; et est transactio de re dubia, et lite incertâ, alieno dato vel promisso vel retento, a lite transactio."

Bract. 310.

A gift, grant, or feoffment, was, at this period, comprehended under the general name of *donatio.* The term feoffment, in the Latin of the middle ages *feoffamentum,* which signified properly the grant of a feud or fee, appears not to have came into use before the reign of Richard I.; about which time we find the charter containing the deed, distinguished by the name of *charta feoffamenti.* The words of donation were generally *dedi et concessi,* to which afterwards was added the specific term *feoffavi.* The words of limitation to convey a fee were, at that time, not reduced to any settled form, being varied at the pleasure of the donor, sometimes simply to the *feoffee et suis,* or *suis post ipsum jure hæreditario perpetue possidendum;* or, in a more particular manner, limited to certain heirs, as *Ricardo et uxori suo et hæredibus suis qui de eâdem veniunt.*

Feoffment.

Reeves' His. i. 91.

In such deeds a clause of warranty was invariably inserted, to the effect that, should the feoffee be evicted of the lands given, the feoffor should recompense him with others of equal value. This clause of warranty was often expressed in very strong terms, as *contra homines,* or *omnes gentes;* or, *contra omnes homines et fœminas,* &c. To the warranty was often added an oath of the party, and also the clause that if he could not warrant, then he or his heirs should give other lands; and, in some cases, that more than

Mad. Diss. 9.

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the value of the land should be given by way of *excambium*, if the donor or his heirs could not warrant.

Confirmation. Mad. Form. Diss. 19.

A confirmation was the strengthening and confirming an estate already created; whereby it was made good and valid as far as it was in the confirmer's power. Mr. Madox observes, that most of the ancient confirmations made after the Conquest, ran like feoffments, from which they were distinguishable chiefly by some words importing a former feoffment or grant. Such deeds of confirmation were very usual at those periods, when feoffees were frequently disseised of their lands upon some suggestion or other, so that many confirmations may be met with, successively made to the same persons or their heirs of the same lands. Sometimes their confirmations seem to have been made by precept or writ from the king or other lords, to put the feoffees or their heirs or successors into seisin, after they had been disseised, or to keep them in their seisin undisturbed.

Release. Reeves' His. i. 92.

A release was properly that which released a person from the claim of another, which, in those unsettled times, was as necessary for protection against hostile claimants, as a confirmation was against disseisors. The words of a release were *quietum clamavi*, *remisi*, *relaxavi*, and the like.

Demise.

Estates were likewise made for life or for term of years, which was afterwards called a demise. This was done by a convention or covenant, of which more will be said hereafter.

Testaments. Glanv. l. 7. c. 5.

As to the disposal of a man's effects at his death, this was not governed by the same law as that which regulated the alienation of lands. When any one wished to make his will, if he was not involved in debt, all his moveables were divided into three equal parts, of which one belonged to his heir, another to his wife, and a third was reserved to himself. If he died leaving no wife, or leaving no issue, in either case the half was reserved to himself, and the other half to the wife or to the issue. Glanville, however, in another place, alludes to the customs of certain places, which regulated the

disposition of a man's effects; one of which was, that he was to remember his lord by the best and chief thing he possessed, in the shape of a heriot; then the church, in the shape of a mortuary; and afterwards other persons, as he thought best; but he concludes with the remark, that *ultima voluntas libera esset:* whether he here meant free as to the whole of his chattels, or only to the third or the half above mentioned, has been a matter of question. Lord Coke was of opinion, that heirs did not inherit chattels by common law; and in this opinion he is strengthened by the decisions of the courts in the reigns subsequent to this period, unless we are to suppose, what is most probable, that the common law was afterwards altered in this particular. The customs of gavelkynd, which are looked upon as the relics of the common law, confirm the opinion, that heirs were actually entitled to chattels. "Let the goods of gavelkynd persons," says the Custumal of Kent, "be parted into three parts, after the funerals and debts paid, if there be lawful issue in life. So that the dead have one part, and his lawful sons and daughters another part, and the wife the third part; and if there be no lawful issue in life, let the dead have one half, and the wife alive, the other half." In reference to this custom, we find that by a law of Canute respecting the effects of an intestate, the lord took the heriot, and the remainder was distributed between the wife, children, and relatives, *cuilibet pro dignitate quæ ad eum pertinet.* By a law of the Conqueror, the children divided the inheritance equally between them. Such is the law as laid down in the Norman code, and by the Regiam Majestatem. Sir Matthew Hale recognises this doctrine, which is also supported by Mr. Justice Blackstone.

2 Inst. 32.

Seld. Tit. of Hon. pt. ii. c. 5. s. 21.

Robins. on Gavel. 287. Somner on Gav. 96.

LL. Can. 68.

LL. Gul. I. 36. Grand Cout. de Norm. c. 36. Reg. Maj. l. 2. c. 7. Hale's Hist. Com. Law, c. 11. 2 Comm. 492.

A woman who was *sui juris* might make a will, but if she was married, she had not that liberty, as it would have been making a will of her husband's goods. It seems, however, that it was not unusual for husbands to give a sort of property to their wives, even during the coverture in the

Glanv. ubi supra.

rationabilem divisam, or the third part of their effects, to which, at their death, they would have been entitled.

If a person was encumbered with debts, he could make no disposition of his effects without the consent of the heir; for the latter was bound, provided he was of age, to make up the deficiency out of the inheritance which came to him. If, however, there was any thing remaining after the payment of the debts, the residue was to be divided into three parts as before. In this, Glanville and the Regiam Majestatem agree; but, according to the Norman code, the heir was to discharge the debts only as far as the inheritance went, which agrees with the rule laid down by Bracton.

Glanv. l. 7. c. 8. Reg. Maj. l. 2. c. 39. Le Grand Cout. de Norm. c. 88. Bract. 61.

CHAPTER IX.

HENRY II.

Administration of Justice.—Curia Regis.—Chief Justiciary.—Steward of all England.—Constable of all England.—Earl Marshal. — Chancellor.— Chamberlain.— Treasurer.—Exchequer.—Chancery.—Common Pleas.—Justices in Eyre.—Proceedings in the Curia Regis.—Pleas concerning Baronies.—Dower.— Villenage.—Homage and Relief.—Purprestures.—Debita Laicorum.—Debts ex Mutuo.—Mortgages.—Criminal Pleas.—Sheriff's Jurisdiction.—The Lord's Court.—Ecclesiastical Jurisdiction.— Constitutions of Clarendon.—Writs.—Proceedings in a Suit.—Attorneys.—Modes of Trial.—Wager of Battle.—The Assize.—Trial by Jury.—Wager of Law.—Trial by Proofs.—Trial by Certificate.—Trial by Record.—Trial by Charter.—Trial by the Ordeal.—Military State.

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THE administration of justice had undergone considerable changes since the Conquest, both as regards the courts, the forms of proceeding therein, and the several remedies which were now furnished for the redress of injuries.

Administration of justice.

Curia Regis.

The supreme court of judicature, which, at the Conquest, took the place of the Saxon *witenagemot*, or court of appeal, was now regularly distinguished by the name of *Curia* or *Aula Regis*, because it was held in the great hall of the king's palace, wherever he happened to reside. In this court the king sat and administered justice in person, for some time after the Conquest. "In curia domini regis ipse in propria persona jura decernit." As the affairs of state became more complicated, the practice of the king's sitting in person gradually ceased, and the office of administering justice was committed to his representatives the judges, to whom he committed all judicial power.

Dial. de Scac. l. 1. s. 4.

Co. 4 Inst. 71.

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The judges, who sat in the Curia Regis, were now distinguished by the name of justices, or justiciaries, besides which there were the great officers of the crown, who took an active part in the judicial proceedings of those times. These were the chief justiciary, the steward of all England, the constable of all England, the chancellor, the chamberlain, and treasurer.

Chief justiciary.

The chief justiciary, *summus justicarius totius Angliæ*, was an officer of great dignity, who answered to the *aldermannus totius Angliæ* among the Saxons. He used, in the king's absence, to govern the kingdom. The first justiciaries after the Conquest, were Odo, bishop of Baieux, uterine brother to the Conqueror, and William Fitzosborne, who had the same power in the north that the former had in the south. Ranulph de Glanville was the chief justiciary in this reign. The power and distinction of this officer gradually diminished in subsequent reigns, and in the time of Henry III. it was finally determined.

Sax. Chron. 190. Hoved. 451.

Steward of all England.

The steward of all England, *seneschallus totius Angliæ*, was an officer of great dignity among the Normans, where he acted as manager of the king's household. The office of *seneschallus Angliæ* was hereditary, and came in this reign to the Earl of Leicester, by his marriage with Petronel, daughter and heir of Hugh Granthemenel, baron of Hinckley, who held that fee in the reign of Henry I. Henry of Bolingbroke, son of John of Gaunt, duke of Lancaster and Earl of Leicester, was the last who had an estate of inheritance in this office, which was afterwards granted only *hac vice*. The steward had various high powers, some of which will be noted hereafter. Among other things he presided at the trial of peers.

Mad. Hist. Excheq. c. 2.

Constable of all England.

The constable of all England was a civil as well as a military officer, called in the Latin of the middle ages, *Constabularius*, that is, *comes stabuli*, or master of the horse, who, in the Roman empire, had charge of the emperor's horses. He was afterwards appointed to the command of the king's armies, both in France and England,

Madox, Hist. ubi supra.

and presided with the marshal in the court of chivalry, which doubtless existed at this period, although no mention is made of it until some time after.

Earl Marshal.

Co. 4. Inst.

The marshal of England, or earl marshal, was also both a civil and military officer, who, from the Teutonic *maehre*, a horse, and *schalc*, a prefect, had also originally a charge of the horse, and was invested with a military command. These two officers took cognisance in the civil capacity of all matters relating to the law of arms.

Chancellor.

The chancellor was an officer who, as before observed, passed from the Roman empire to the Saxons, and all other countries of Europe, where he was invested with different powers, but was every where an officer of great distinction. He acted in some cases as a scribe or secretary, and bore that name; he was, however, most generally called *cancellarius*, because he was the chief person *ad cancellos*, that is as much as to say, within the bar or the lattice-work which parted off the court. He was an officer that enjoyed the entire confidence of the king among the Saxons, as has been before pointed out; and at the Conquest both his office and his dignity was enlarged. On the introduction of seals, which took place at that time, he had the keeping of the king's seal, which he affixed to all charters and deeds which required any solemn authentication; and as writs came into general use soon after the Conquest, it was his business to frame and issue them from his court, which, in this reign, was known by the name of the Chancery. It is not surprising, therefore, to find that he exercised, even at this period, a sort of equitable jurisdiction, by which he mitigated the rigour of the common law, for so we may understand the lines addressed by John of Salisbury to Becket, the chancellor in this king's reign.

Ingulph. Hist. Co. 4. Inst. 78. Dugd. Orig. Jur. 33.

Johan. Saris. in Polycrat.

> Quærendus Regni tibi Cancellarius Angli
> Primus sollicita mente petendus erit.
> Hic est, qui Regni leges cancellat iniquas,
> Et mandata pii Principis æqua facit.
> Quid obest populo, vel moribus est inimicum
> Quicquid id est, per eum desinit esse.

Chamberlain.

The chamberlain, *camerarius*, from *camera*, was an officer of great distinction, who had the charge and direction of all things in the king's household.

Treasurer.

The treasurer, *thesaurarius regis*, had the chief direction of all things relating to the king's revenue, and on that account principally, presided in the court of Exchequer.

Mad. Hist. Excheq. ubi supra.

The Curia Regis had hitherto been considered as one supreme tribunal, where justice was administered under the eye, if not in the immediate presence, of the king. It appears, however, at the Conquest, if not before, to have been divided into different branches or departments, that were afterwards erected into many distinct courts.

Exchequer.

Co. 4. Inst. 63.

As the Conqueror had taken special care of the revenues of the crown, there is no doubt but the court of Exchequer acquired considerable importance in his time: after which it was known by the name of Curia Regis ad Scaccarium. *Scaccarium*, from the Italian *scacco*, a chess-board, was applied to this court, because the table at which the judges sat, was in the form of a chessboard. It is called in English Exchequer, from the chequered cloth expanding on the board. Probably none of lower degrees than barons were originally judges in this court, whence they have retained the name of barons of the Exchequer. The Exchequer was of such consequence in this king's reign, that the *Dialogus de Scaccario*, before referred to, contains a minute description of its officers and jurisdiction.

Chancery.

Co. 4. Inst. 78.

That the court of Chancery existed long before this period is clear, from several historical documents. In a history of Ely, written in the reign of Stephen, this court is said to have existed in the reign of king Ethelred; and if any credit is to be given to the Mirror, a court of Chancery existed long before, from which issued remedial writs. From what has been said on the dignity and judicial character of the great officer who presided in this court, it is beyond all doubt that the Chancery was a court of great importance in this reign.

Common Pleas.

Whether there was a court of Common Pleas is not so certain. Mr. Madox is of opinion that it was not erected until after the reign of Henry II.; and Sir Matthew Hale says, "Neither do I find any distinct mention of the Common Pleas." Lord Coke, on the other hand, interprets the words of Glanville, "Coram justitiis in banco sedentibus," justices in the common bench, in the modern sense of the word; and this opinion is confirmed by the decision of all the judges in the reign of Edward IV., when it was holden, "That all the courts of the king have been, time out of memory, so as a man cannot know which of them is the ancientest court." Of this court further notice will be taken, when it was unquestionably erected into a distinct tribunal.

Mad. Hist. of Excheq. c. 19.
Co. 4. Inst. 99.
Hale, Hist. Com. Law, c. 7.
Glanv. l. 2. c. 6.

Justices in Eyre.

In the time of the Saxons, it had been found sufficient to commit the administration of justice to the county, and other inferior courts; but as the introduction of the Norman population, principles, and manners had bred many disorders in the kingdom, a higher authority and more experience was wanted, than what was possessed either by those who presided in those petty tribunals, or in the freemen who acted as judges there. To remedy this evil, Henry, by the advice of his council, held at Northampton A. D. 1176, divided the kingdom into certain circuits, and appointed justices itinerant, or justices in Eyre: three to each circuit, to hear and determine all causes. As this appointment is first mentioned at that period, Sir Matthew Hale dates the institution of these justices from that year; but Mr. Madox has shown, from records in the Exchequer, that the appointment of such justices took place as early as the eighteenth of Henry I., in imitation, probably, of a like institution formed by Louis le Gros. During the turbulent reign of Stephen, they were dropped, but were revived in the twelfth year of this king's reign, as also in the seventeenth year, and were regularly established in the twenty-second year, so as to form a part of our judicature. Sir Henry Spelman supposes that *justitiæ*, the name by which the judges were distinguished in

Hale, Hist. Com. Law, c. 7.
Mad. Hist. Excheq. c. 3.

Spelm. Gloss. ad Voc.

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LL Hen. I. c. 42.

the laws of Henry I., to have taken the place of the aldermen among the Saxons. These justices in Eyre had, however, an enlarged jurisdiction, and derived their commission immediately from the king; by virtue of which they were empowered to hear and determine all pleas, civil and criminal, within their circuit; as also all pleas touching the king and his crown, which would otherwise have been heard in the Curia Regis. For their information and guidance, they were furnished with certain heads of inquiry, called *assisæ*, which were framed at Clarendon, and were afterwards known by the name of *capitula itineris*. The justices, being the same as filled the office of justiciaries in the Curia Regis, had the advantage of being always near the person of the king, and also in close communication with one another, so that they could consult together when any point of difficulty occurred. Ranulph de Glanville, author of the work so often quoted, was among the number of those first appointed to fill this office.

Assis. Clarend. apud Wilk. p. 332.

Jurisdiction of courts.

The jurisdiction of courts was now defined with more precision, but in perfect accordance with what is laid down in the laws of Henry I. The Norman term *placitum*, in the sense of a plea, or the cause of a suit, was now regularly established. Pleas were likewise distinguished into civil and criminal; the former of which are treated of rather largely by the author so often quoted, particularly as regards the Curia Regis, or the supreme court of judicature, and the course of proceedings therein.

Ante, p. 53.

Curia Regis. Glanv. l. 1. c. 2.

The civil pleas heard in the Curia Regis were those which respected baronies, advowsons of churches, questions of condition, and of dower, when a woman was debarred of it entirely; also respecting villenage, the performance of homage, and the receiving of reliefs, of purprestures or encroachments on the king or any superior lord, and of the *debita laicorum*.

Pleas concerning baronies. Glanv. l. 1. c. 5.

Pleas concerning baronies, included generally all questions respecting a man's fee or freehold, which, if the king

pleased, were decided in the Curia Regis. In some cases the right of the freehold was in question, and in others only the seisin or possession, the privation of which was termed disseisin, and was held to be so serious an injury in that day, as to be little short of a criminal offence.

Glanv. l. 13. c. 3.

Advowsons.

Pleas concerning ecclesiastical advowsons, regarded either the right itself, that is, the right of presenting a person to a church, or related merely to the last presentation, that is, the seisin of the right. Advowson, in Latin *advocatio*, signified properly the right of presenting a person to a church, and is synonymous with *patronatus*, whence he who possessed this right was termed the patron, because those who originally obtained the right of presentation to any church, were maintainers or benefactors to the same, either by building or endowing it, and were expected to avow it, that is, to take it under their protection, and defend its just rights. This *jus patronatus* was admitted in the Roman empire at an early period of the Christian church.

Glanv. l. 4. c. 1. Spelm. Gloss. ad Voc. Cowel, Inter. ad Voc.

Nov. 26. t. 12. c. 2. 2. Comm. 21.

Dower.

Pleas concerning dower were heard in the king's court, when a woman was altogether debarred from receiving it; but when a part only of the dower was withheld from her, then the plea might be heard in the court of her warrantor.

Glanv. l. 6. c. 4, 5. Ibid. c. 6.

Villenage.

When the plea concerning villenage regarded the condition of the person, whether villein born or not, it was heard in the king's court; but when it regarded the claim of a person to one as his villein, the plea proceeded before the sheriff.

Glanv. l. 5. c. 1, 2, 3, 4.

Homage and relief.

As to pleas concerning homage and relief, when the lord refused to receive the homage of the heir, or the reasonable relief when tendered to him, the heir might complain of him to the king and his justices; but when the tenant did any thing to the disinherison of his lord, he might be compelled to defend himself in the lord's court; so, likewise, the lord might distrain his homager to appear in his court to answer for any service, of which the tenant deforced him, and if the lord was unable to constrain him, then he might have

Glanv. l. 9. c. 1.

Ibid. l. 9. c. 8, 9, 10.

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recourse to the king or his justice, who referred the plea to the sheriff, to be heard in the county court.

Purprestures.
Glanv. l. 9. c. 11.

Pleas concerning purprestures were heard in the king's court, or before the king's justices in Eyre, when the injury was committed against the king. Purpresture, in Latin *purprestura* or *perprestura*, was, when any thing was unlawfully encroached upon against the king, as intruding on his royal demesne, obstructing the public ways, and turning public waters from their course. Offences of this kind were also denominated purprestures by the old feudal writers, when committed by a tenant against his lord, or by one neighbour against another. In the former case the offender was constrained to answer in the lord's court, but in the latter case, if it were a question of right, the plea was to be heard in the king's court. In purprestures of this kind, the boundaries of lands were sometimes destroyed and encroached on, in which case the sheriff was directed to make *rationabilem divisam* between the lands of one man and those of another, so that the boundaries should be as they were in the time of Henry I.

Le Grand Cout. de Norm. c. 10. Manw. For. Laws, 169.

Glanv. l. 9. c. 14.

Purprestures were one kind of offences for which the tenant, on conviction, irrecoverably lost the tenements he held of his lord; but in the case of the king, he was also to restore that which he had encroached upon. If convicted of having encroached by building upon the king's street, the edifices were to belong to the king, or at least such as were found in the royal district; besides which, he was to be amerced to the king.

Debita laicorum.

The pleas of debt, which were heard in the king's court, related to the *debita laicorum*, as they were termed, to distinguish them from those debts and dues that were recoverable in the courts ecclesiastical. As the *debita laicorum* belonged to the king's crown and dignity, they were of course cognizable in the Curia Regis, but they had not at this period acquired the importance which was afterwards attached to them, being considered, as Glanville observes,

Glanv. l. 10. c. 8.

in the light of private contracts, arising from the consent of individuals, of which the king's court did not usually take cognizance. It is, perhaps, on this account that the law respecting debts was so little defined in his time, and that, in speaking of debts, he adopts the language of the civil law. He describes debts as arising *ex causâ mutui* upon a borrowing or lending, *ex causâ venditionis* upon a sale, *ex commodato* upon a lending, *ex locato* upon a hiring, *ex deposito* upon a deposit, &c.

Debts ex mutuo. Glanv. l. 10. c. 3.

A debt *ex mutuo* was, when one person intrusted another with any thing that consisted of number, weight, or measure; but if he, who so intrusted another, received a return more than he lent, he was considered in the light of a usurer, and incurred the penalty of usury. Things were lent sometimes *sub plegiorum datione*, that is, where some one was surety for the restoring of it; sometimes *sub vadii positione*, that is, when a pledge was given; sometimes *sub fidei interpositione*, when a bare promise was made for the return; sometimes *sub chartæ expositione*, that is, when a charter was made acknowledging the lending.

Ibid. c. 4.

When any thing was owing *sub plegiorum datione*, and the principal debtor failed in payment, recourse was had to the sureties, who were bound to satisfy the creditor. But if a man had become pledge for another's appearance, and he happened, in consequence of the default of the principal, to be amerced to the king, he could not afterwards recover any thing against him for whom he became surety. The Regiam Majestatem, however, lays it down that he might recover, but the Mirror agrees with Glanville.

Ibid. c. 5. Reg. Maj. l. 3. c. 1. Mir. c. 2.

Glanv. l. 10. c. 6.

Things lent *sub vadii positione*, might either be moveables, as chattels; or immoveables, as lands, tenements, and rents: they might be given in pledge, either for a fixed term or not; sometimes in *mortuo vadio* and sometimes not. When moveables were pledged, and seisin, as it was called, was given, the law required that the thing pledged should be used so as to suffer no detriment, and if any detriment happened to it within the term appointed, it was to be set

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Glanv. c. 8.

off against the debt, according to the damage sustained. If, after receiving the loan, the debtor failed in delivering the pledge, it appears doubtful whether the law furnished any remedy at that time for the creditor, as the debtor could not, in case he had previously pledged it to another, be put to answer in the Curia Regis respecting any priority of pledging.

Mortgages.

Glanv. l. 10. c. 6. Reg. Maj. l. 3. c. 2. Le Grand Cout. de Norm. c. 113.

When immoveables were pledged, it was generally agreed between the parties whether the rents and profits should, in the mean time, go towards the discharge of the debt or not. An agreement of the first kind was considered as just and binding; but the latter, which was termed a *mortuum vadium*, or mortgage, was looked upon in the same light as usury. If a debt could not be proved by any other proof, except the faith or promise of the debtor, this would not be received as a proof in the king's court, but the creditor was left to his suit in the court Christian *de Fidei Læsione vel Transgressione*, for a breach of promise, when a penance might be imposed upon the convicted party, if he refused to make satisfaction. Such was the imperfect state of the law in regard to matters of simple debt and contract at this period. Besides the above-mentioned pleas, other matters were transacted in the Curia Regis, respecting final concords, conventions, releases, and the like.

Criminal pleas heard in the Curia Regis.

Criminal pleas, which regarded crimes of the higher kind belonging to the king's crown, were also heard in the Curia Regis. They were denominated by distinction *placita coronæ*, because they regarded the king's crown and dignity. These were the crime of lese majesty, or treason; the fraudulent concealment of treasure trove; breaking of the king's peace, homicide, *crimen incendii*, or arson; *crimen roberiæ*, or robbery; *raptus virginum*, or *rapes*; *crimen falsi*, falsifying or forging; which are very similar to the offences mentioned in the laws of Henry I. as belonging to the *Jus Regis*.

Ante, p. 53.

Sheriff's jurisdiction.

On the removal of the bishop and aldermen from the county court, the office of sheriff rose in importance. To

him belonged both a civil and criminal jurisdiction. To the civil jurisdiction of the sheriff appertained the plea concerning the right of freehold, when the lord's court failed in doing justice; also the plea concerning villenage, when it concerned the claim of any one to a villein; and the plea of dower, when a part only of the dower was withheld; also other matters whenever the sheriff had the king's writ authorizing him to hold jurisdiction. But all pleas of this description might be removed from the county court to the supreme court of the king, for a variety of causes; as, on account of any doubt which might arise concerning the plea itself, on which the county court was unable to decide. To the criminal jurisdiction of the sheriff belonged, at this time, the plea of theft and other minor offences, which were decided according to the customs of different counties. Besides, in case of neglect on the part of the lords of franchises, it appertained to the sheriff to take cognizance of scuffles, blows, and wounds, unless the accuser added to his charge that the offence was committed against the king's peace. The Regiam Majestatem makes this allegation the ground of the sheriff's jurisdiction, such minor offences being said to be committed against the sheriff's peace. The court in which the sheriff exercised his civil jurisdiction, retained the name of the *Comitatus*, or County Court; that in which he exercised his criminal jurisdiction, was afterwards distinguished by the name of the Sheriff's Tourn.

Glanv. l. 1. c. 21.
Ibid. l. 5. c. 1.
Ibid. l. 9. c. 9, 10.
l. 12. c. 9.
Ibid. l. 6. c. 8.
Ibid. l. 1. c. 2.
Ibid. l. 1. c. 4.
Reg. Maj. l. 1. c. 3.
Reeves' His. i. 113.

The lord's court.

In the lord's court were heard some pleas of right concerning land, as for services and the like, according to the reasonable customs of the manor, which were very numerous and various. Besides which it appertained to the lord's jurisdiction to take cognizance of some offences within the franchise, after the manner of the Saxons. The court in which he exercised his civil jurisdiction, was named *Curia Domini* or *Curia Baronis*, in English afterwards the Court Baron. The court in which he exercised his criminal jurisdiction, was called in the Latin of the middle ages *Leta*, in English a Court Leet. This term, though of Saxon origin,

Glanv. l. 2. c. 6.

does not occur in any of the Saxon laws, but is to be met with in the Conqueror's charter for the foundation of Battle Abbey, and also in doomsday book. It is derived from the Saxon *leod people*, signifying the court of the people; because all the residents in a manor assembled there, whereas only the freemen were summoned to the Court Baron. The law required that in all cases the lord's court should be held within the fee, and never out of it.

Spelm. Gloss. ad Voc. Leta. Du Cange Gloss. Glanv. l. 12. c. 7.

Causes might be removed, as before observed, from the lord's court into the county court, and through the medium of this latter into the king's court. Besides, the lord himself might adjourn his court into the king's court, in order to have the advice and assent of the latter.

Ibid. l. 8. c. 11.

Ecclesiastical power.

One of the greatest evils attending the accession of William to the English throne, was, that owing to the good understanding that subsisted between him and the Holy See, the pope gained a footing in England, which had heretofore been denied to him; and the union which subsisted between the two estates of the realm in the time of the Saxons was now destroyed. This evil was greatly augmented by the separation of the ecclesiastical from the secular jurisdiction, which altogether severed the clergy from the laity, and gave them different feelings and interests. The clergy, co-operating with the church of Rome, aimed at making themselves independent, and would, if they had not met with a timely check, have effected their purpose.

Constitutions of Clarendon.

But Henry, feeling the importance of maintaining his power, enacted, by the advice of his council at Clarendon, A. D. 1164, sixteen articles, distinguished by the name of the Constitutions of Clarendon, which had for their object the putting the clergy on their ancient footing, and restoring the ancient usages of the realm. By one of these constitutions, the clergy were prohibited from leaving the realm without the king's consent, and, if they obtained licence, they were to give security for their return, which was in conformity with what was required of the clergy in the time of the Saxons, and was rendered necessary by the frequent com-

Const. Clar. apud Wilk. LL. Anglo-Sax. p. 321.

munications which had of late been kept up between the English clergy and the Romish church.

To prevent appeals to Rome, which had become frequent since the Conquest, it was enacted, by chap. 8, " that if any should arise, they ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop; and if the archbishop should fail in doing justice, the cause was to be brought before the king, that by his precept it might be determined in the king's court; and not proceed any further without his consent." This was in conformity with ancient usage in the time of the Saxons, as has already been shown; but by a law of Henry I. it appears that appeals to Rome were sanctioned.

Ante, p. 56.

The right of the king to the temporalities of vacant sees, was asserted by another article, chap. 15; and also, when any church was to be filled, it was moreover enacted, that the king ought to send for the principal clergy thereof, and the election ought to be made in the king's chapel, with the king's assent, and the advice of such persons as he thought fit to consult. The prelate elect was to do homage and fealty to the king as his liege of life, limb, and worldly honour (saving his order), before he was consecrated.

The bounds of ecclesiastical and secular jurisdiction, were likewise prescribed in several particulars. By the third article in the Constitutions, ecclesiastics were required to answer in the king's court for every offence with which they stood charged, which was only a confirmation of a law of Canute, which required, that if a clerk was guilty of homicide, he was to be degraded from his office, and be moreover punished as another man. The clergy, however, subsequently procured a relaxation of this constitution in their favour, which was afterwards known by the name of the *privilegium clericale*, or benefit of clergy; a relaxation that was in some measure warranted by the laws of the Saxons, when there was a better understanding between the clergy and laity than subsisted at present. If a priest was guilty of any crime worthy of death, he was given over to

LL. Can. c. 36.

Jud. Civ. apud Wilk. LL. Anglo-Sax. 72.

the church. "Si sacris initiatus," says the law of Athelstan, "aliquid morte dignum perpetraverit, capiatur et ad episcopi judicium deferatur."

Glanv. l. 12. c. 25.

Questions about presentations belonged properly to the bishop's court, but the right of advowson was cognizable in the king's court, so likewise pleas concerning ecclesiastical fees in frankalmoigne were heard in the court Christian, but if the fee was a lay one, or the question was "Utrum tenementum sit pertinens ad eleemosynam, sive ad fœdum laicum," it was, by chap. 9, to be decided by a recognition in the king's court. Pleas of debt were assigned by chap. 12, to the king's judicature, but if the party could not obtain redress in the secular courts, he might, as before observed, sue the party for a breach of promise in the court Christian. By chap. 7, no tenant *in capite* was to be excommunicated in the ecclesiastical courts, nor his lands laid under interdict, until application had first been made to the king, or in his absence to the chief justiciary; besides which there were several other regulations of a similar character.

Const. Clar. apud Wilk. 321.

In other respects the ecclesiastical jurisdiction began now to assume the form that was prescribed by the common law. In the spiritual courts were heard causes not only of a purely spiritual nature, as heresies, schisms, tithes, &c. which were determined by the canon laws, but also some other causes, which were incidentally attached to this jurisdiction, as the probates of wills, and pleas regarding testaments; also the administration of intestate's effects, which, when the bishop and alderman presided in the county and hundred courts, was probably left to the former, and afterwards was regularly assigned to the ecclesiastical jurisdiction. That such was the case soon after the Conquest is clear from the charter of Henry I., which directed that the goods of an intestate should be divided *pro anima ejus*, that is, for the good of his soul, which made intestacy a spiritual cause; and in the charter of Stephen, it is expressly

Glanv. l. 7. c. 8.

Selden's Works, vol. iii. 1672-9. Blackstone's Tracts, 286. Ibid. 288. Reeves' His. i. 73, 74.

added, "consilio ecclesiæ," that is, by the advice or direction of the church.

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As marriage was an affair of a spiritual nature, it naturally fell under the cognizance of the spiritual court, and as a consequence, questions of legitimacy and bastardy were also determined there; but, as far as these questions were connected with the descent of lands, they were to be heard in the superior court.

Glanv. l. 7. c. 13.

That the secular jurisdiction might not be encroached upon in violation of these regulations, it was now become usual to stay proceedings by a writ of prohibition, directed to the ecclesiastical courts, whenever improper suits were commenced therein.

Ecclesiastical courts.

With regard to the ecclesiastical courts that were established in this day, we find express mention of the archdeacon's, the bishop's, and the archbishop's court, the first of which had now acquired a jurisdiction independent of the bishop, and the last was become a regular court of appeal.

Wilk. LL. Anglo-Sax. 331. Litt. Hist. Hen. II. vol iv. p. 265.

When the above-mentioned constitutions were submitted to the pope Alexander, he was so dissatisfied with them, that in full consistory he passed a solemn condemnation on them, particularly those as specified above, which were the most objectionable. Becket too, in his zeal for the Holy See, was no less strenuous in his opposition; but, notwithstanding, they were confirmed in the council of Northampton in 1176, and were strictly adhered to in all particulars, except that which required ecclesiastics to answer for any crime before a secular judge. Henry, awed by the censures of the church, yielded this point, which gave rise to the privilege above-mentioned. A copy of these constitutions is to be found in Wilkin's Saxon Laws, and also in Littleton's History of Henry II.; this latter copy, from the Cottonian MS. of Becket's Life and Epistles, is reckoned the most ancient and correct of any.

Reeves' His. i. 79.

Writs.

As the manners of the age were now less simple than in the time of the Saxons, and questions of greater complexity were now brought before the court, judicial proceedings

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were conducted with more formality and regularity. After the Conquest, the king's commands were all conveyed by means of precepts in writing, which, for the most part, when relating to matters of justice, were called in Latin *brevia.* The English word writ was of Saxon origin, and Mr. Dugdale, on the authority of a record, maintains that both the name and the thing was in use among the Saxons, for the purpose of compelling defendants to appear in court, but it has already been shown that the use of writs among the Saxons must have been very rare, as suits were then, for the most part, commenced by entering a plaint with the officer of the court, as the practice is now in our petty courts. It was called *breve* in Latin, because it contained briefly the matter of complaint alleged by the plaintiff.

Dugd. Orig. Jur. 34.

Spelm. Gloss. Du Cange, Gloss. ad Voc.

There are several examples extant of such precepts in the time of the Conqueror, in regard to public affairs; and in the reign of Henry I. *contemptus brevium* was an offence which subjected the person guilty of it to be amerced to the king. Examples of judicial writs are first to be met with in this reign, when it was necessary to commence every suit in the king's court with such a writ, although in the county and inferior courts the Saxon mode of lodging the plaint with the officer of the court was still in use; besides, it appears that a lord might, without the king's writ or precept, distrain his tenant to appear in his court to answer any charge. Writs were made out in the name and under the seal of the king, and were tested, that is, subscribed with the word *teste*, in the name of the chief justiciary.

LL. Hen. I. c. 14.

Glanv. l. 2. c. 2.

Ibid. l. 9. c. 1.

Writs were either such as gave original commencement to a suit, or they were such as arose out of the suit; the former of which were afterwards distinguished by the name of original writs, and the latter by that of judicial writs. Original writs were also in their nature optional or peremptory; or, as they have since been styled, a *præcipe*, or a *si te fecerit securum*. The *præcipe* was in the alternative, commanding the defendant to do the thing required; as, to restore the land which was claimed, or to perform a covenant, &c. or

Ibid. l. 1. c. 6.

to show reason wherefore he had not done it. The other species of original writs, called a *si te fecerit securum*, from the words of the writ, was directed to the sheriff to cause the defendant to appear in court, without any option given to him, provided the plaintiff gave the sheriff security effectually to prosecute his suit. The security here spoken of, was agreeable to ancient usage, that in case a plaintiff brought an action without cause, or failed in the prosecution of it when brought, he was liable to an amercement from the crown for raising a false accusation, which is the form of judgment to the present day. By the Gothic constitutions, no person was permitted to lodge a complaint against another, without entering into an engagement to prosecute his suit.

Glanv. l. 13.

3. Comm. 275.

Stiernh. de Jure. Goth. l. 3. c. 7.

The wording of the writ was varied according to the nature of the injury for which a remedy was sought, and writs in consequence received a variety of appellations, according to the object and occasion of them. When a person was injured by privation of his fee or freehold, the writ which lay for the remedy of this injury was, by distinction, called *breve de recto*, or a writ of right, which is the first writ mentioned by any author, and ran thus: " Rex vicecomiti salutem præcipe A. quod sine delatione reddat B. unam hidam in villâ—unde idem B. queritur quod prædictus A. ei deforceat et nisi fecerit, summone eum per bonos summonitores quod sit ibi coram me vel justitiariis meis in crastino post Octabis Clausi Paschæ, (naming the place where the court sat,) ostensurus quare non fecerit, et habeas ibi summonitores et hoc breve. Teste Ranulpho de Glanville apud Clarendon." There were, besides, other writs, which were in the nature of a writ of right, as a writ of advowson for one who claimed the right of advowson, a writ of dower, which lay for a widow claiming her dower, sometimes called an *unde nihil*, when she had received no part of it; a writ *de nativis*, which lay for one claiming a villein born, or a writ of homage, and the like. These were, for the most part, directed to the sheriff, except the writ of dower, which was

Glanv. l. 1. c 6.

Ibid. l. 4. c. 2.

Ibid. l. 6. c. 7.

Ibid. l. 5. c. 2.

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directed to the warrantor. Some writs were named from the injuries which they were intended to remedy, as a writ of debt, &c.

Many writs were directed immediately to the sheriff, requiring him to do right between the parties: these were afterwards called writs of justicies, and were in frequent use in that day, as a writ of admeasurement of pasture, and the like; but one of the principal writs of this description, was the writ of replevin, which lay for a tenant for the recovery of his cattle which had been distrained by his lord, upon pledges given as a security to stand the award of justice, in the matter of dispute between the parties.

Glanv. l. 12.

Some writs were named from the purpose of them, as a writ of prohibition, to stay proceedings in an inferior court; a writ of *capias*, for taking the body of the defendant; a writ of execution, for putting in force the sentence of a court; a writ of *pone*, for removing a cause from the county court to the Curia Regis; a writ of *recordari*, for transferring to the Curia Regis the record of a suit in the county court. The first of these writs was directed mostly to the judges of the ecclesiastical courts, but the others were directed to the sheriff to whom it belonged, to attend to all the proceedings touching a suit or action.

Ibid. l. 4. c. 13.

Ibid. l. 6. c. 7.

Ibid. l. 8. c. 7.

Proceeding in a suit.

The issuing of the writs was followed by the summons, which, if not obeyed, might be repeated three several times in a writ of right. Instead of appearing on the summons, a party might essoin, that was, excuse himself; a practice which was very frequent in those days. Essoins were admitted on various grounds, as that of being absent on the king's service, or on a pilgrimage to the Holy Land, or beyond seas; on account of sickness, and the like. Essoins are mentioned in the laws of Henry I., and as the practice existed in other countries, it was most probably introduced at the Conquest, although such indulgences were admitted of course among the less formal proceedings of the Saxons.

Assis. de Jerus. c. 158. Le Grand Cout. de Norm. sparsim. LL. Hen. I. c. 61.

If the defendant neither came nor essoined himself, the land was, after the three summonses, taken into the king's

hands; and after the lapse of another fifteen days, if he failed to appear, it was adjudged to his adversary, and his pledges were amerced. If the demandant failed to appear, or to cast an essoin, the tenant was dismissed *sine die;* but it was a question in the time of Glanville, whether the demandant, by such default, was precluded from instituting a new suit, or whether he was only to lose his first with costs, and be amerced to the king. In all cases the pledges which he had found *de clamore prosequendo,* were likewise to be amerced. In a criminal plea, where the king had an interest, the appellant was bound to prosecute his appeal, or to be imprisoned until he did.

Glanv. l. 1. c. 32.

When both parties appeared in court, the demandant counted upon the writ as it was called, that is, set forth his claim, which, in a writ of right, was as follows: "Peto versus istum H. fœdum dimidii militis vel duas carucatas terræ in illâ villâ sicut jus meum, et hæreditatem meam unde pater meus vel avus meus fuit seisitus in dominico suo sicut de fœdo, tempore regis Henrici primi vel post primam coronationem domini Regis, &c." Sometimes after the claim, the tenant would pray a view of the land in question, upon which a writ issued to the sheriff to send *liberos et legales homines*, to take a view of it; and that four of them should certify their view to the court. Likewise, as warranty was a condition commonly annexed to the tenure of land, it frequently happened that when the tenant was impleaded in a writ of right, he would call his warrantor into court, which was called vouching to warranty. If the warrantor appeared in court, and entered into the warranty, then the suit was carried on between him and the demandant; but if he refused to enter into the warranty, then it was carried on between him and the tenant. When it was ascertained that he was bound to take that obligation on him, then, if the land was recovered in court by the demandant, the warrantor was, as before observed, to give the tenant an equivalent. On the subject of warranty, Glanville expresses a doubt, whether a warrantor could call another warrantor, and if so,

Glanv. l. 2. c. 3.

Glanv. l. 10. c. 5. Reg. Maj. l. 3. c. 13.

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where the liberty of vouching to warranty was to stop: the Regiam Majestatem says at the fourth warrantor.

Attornies.

In prosecuting pleas as above mentioned, the parties might attend themselves or by an attorney, called in those days, *responsalis ad lucrandum vel perdendum*, who was appointed in open court, before the justices sitting on the bench. (Glanv. l. 11.)

No attorney could act without an express appointment in court from the principal; but it was not necessary for the adverse party to be present, nor the attorney himself, provided he was known to the court. It was not, however, sufficient for one to have been appointed bailiff or steward in the management of another man's estate, to entitle him to be received as his attorney in court. He must have a special authority to act for him in that particular cause. This was particularly the case in the court of Exchequer. (Mad. Hist. Excheq. c. 23. s. 5.)

At what time the practice of admitting attornies was introduced, it is not possible to determine. In the time of the Saxons, people prosecuted their own suits in person, unless where one of the parties was a female, or was otherwise disabled from attending. In such cases, as we have seen in the suit between Enneawne and her son, some responsible person was permitted to appear for her. This informality was admissible in a small community, where all the parties were known to each other, and the questions of law were simple, and easily to be decided. But when the interests of the contending parties grew more complicated, and judicial proceedings more systematic, the necessity was felt of having the assistance of persons professionally qualified to conduct a suit. (Ante, p. 30.)

Attorney, in the Latin of the middle ages *attornatus* or *atturnatus*, from the French *tourne*, a turn, signified one put in the turn or place of another; and was at first particularly applied in the feudal law to the putting of one lord in the place of another, to receive the homage and service of his tenants. Attornies are mentioned by name by Ingulphus, and are particularly spoken of in the Grand Coutumier of (Spelm. Gloss. Du Cange, Gloss. ad Voc. Attornatus.)

Normandy, whence, probably, they found their way to England. At the period we are now treating of, they appear to have gained a settled footing. The introduction of the civil law, where attornies are called *procuratores*, proctors, contributed, no doubt, to their regular admission into our common-law courts.

Modes of trial.

As to the modes of trial in use in this day, they were of different kinds, according to the nature of the proceeding. Questions of right or propriety were now decided two ways, namely, the duel, which, since the Conquest, had been the common mode, and the assize, or grand assize, which was instituted by this king.

Wager of battle.
Glanv. l. 2. c. 1.

The demandant in a writ of right, usually concluded his claim with the words, "And this I am ready to prove by my freeman, John, who either saw this, or heard his father say that he saw the seisin of the demandant or of his ancestors: whose father desired him to testify the truth." If the tenant chose to defend himself by the duel, he was obliged to deny the right of the demandant *de verbo in verbum*, and this he might do either in person or by some champion. As it was necessary that the champion of the demandant should be a witness of the matter *per visum et auditum*, he could not be his own champion, nor could any one hired for the purpose be admitted as a champion. If, however, the one that was named died before the combat, the demandant might appoint another. It was a question in Glanville's time, whether a champion could choose a substitute; and he thought that by the law of the realm, the champion of the demandant might choose his own son.

Co. 2 Inst. 246. Spelm. Gloss.
Du Cange, Gloss. ad Voc. Duellum.
LL. Hen. I. c. 59.

On the day of battle, the parties appeared in court, or in the place marked out for the court, where inferior persons only fought with short batons, but gentlemen were armed at all points. The champion of the tenant then threw down his glove by way of a gage or pledge, which, being taken up by the champion of the demandant, each party thus waged the battle, or stipulated to decide the dispute by battle, whence the proceeding was called *vadiatio duelli*.

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The champions were not bound to fight after the stars appeared; and if the champion of the tenant could defend himself until that time, the tenant was quite cleared from any right of the demandant to recover against him, for it was a rule in law, that whatever was determined in court by duel, remained for ever fixed and unalterable. In that case the champion of the demandant lost his *liberam legem*, that is, became infamous, and could never after be named as a champion in a writ of right, although he might, in a criminal suit, defend himself as an appellant or defendant. By the Norman code, he was ever after incompetent to be a witness, champion, and juror, &c. Besides, a fine of sixty shillings was imposed on him for his cowardice, in the name of *recreantisa*, which signified cowardice. The party vanquished, was likewise obliged to pronounce the horrible word *cravent* before the people, which was an acknowledgment of his cowardice.

Spelm. Gloss. ad Voc. Glanv. l. 2. c. 3.

Le Grand Cout. de Norm. c. 127. LL. Hen. I. c. 59. 2 Inst. 264.

The duel might be resorted to in all pleas that were determinable by the assize, in the king's court; but it was never a favoured practice. Henry I. prohibited it in deciding questions of property of small value, as we are informed by the Brussel *Usage des Fiefs*, quoted by Mr. Beames. By the institution of the assize, the barbarous practice was virtually abolished. In criminal pleas it was employed only where there was an appellor or accuser, who, standing forth and making his charge, declared himself ready to prove it *per corpus*, by his body; or, as Glanville expresses it, according as the court should think fit; which, at this period, mostly determined on giving the accused the opportunity of defending himself by waging his battle.

Glanv. l. 2. c. 19.

Notes to Glanv. l. 2. c. 3.

Glanv. l. 14. c. 1.

The Assize.

The institution of the assize, which is described by Glanville, as "regale quoddam beneficium clementia principis de consensu procerum populis indultum," was, in fact, no other than an application of the trial by jury, to the most important questions of right, which had heretofore been decided by the duel. Although this differed both from the Saxon and Norman modes of trial in several particulars, yet it was

Glanv. l. 2. c. 7.

otherwise conformable to the manners and judicial proceedings of both people. The Saxon freemen, we have seen, were not called upon to give their verdict upon oath, because none of inferior condition to thanes appear to have performed the office of deciding; but more formalities were now found necessary, both in the selection of the persons, and in the binding them by oath, under a heavy penalty, to give a true verdict. The jury was to consist of sixteen, none below the degree of knights, four of whom were chosen by the sheriff, and the twelve others by those four. They were considered in the light of witnesses, as in the time of the Saxons, and were required to be not only of the vicinage, but also acquainted with the merits of the case. If, therefore, any of the knights happened to be ignorant of the matter in question, others were to be instituted in their room, who could speak from their knowledge *per proprium visum et auditum*. This was afterwards called afforcing the assize. The jurors might also then be excepted against, or, as it was afterwards called, challenged, if there were any thing objectionable in them to either party. Besides, that jurors might be careful not to *jurare temere*, swear falsely, it was ordained by the Royal Institution, that if any were proved, or confessed themselves, guilty of perjury, they were to forfeit all their moveables and chattels to the king, be kept in prison for a year and a day, and lose their *liberam legem*, which was afterwards called an attaint, and was tried by a jury of twenty-four knights. Something similar to this is to be found in the old Gothic constitution; by which, if the jury were found to have given a false verdict, they were fined, and rendered infamous for ever.

Glanv. l. 2. c. 10, 11.

Ibid. c. 17.

Bract. l. 4. c. 19.

Glanv. l. 2. c. 19.

Le Grand Cout. c. 62. Stiernh. de Jur. Goth. l. 1. 3 Comm. 402.

This institution was called an assize, in Latin *assisa*, from *assidere*, to sit together; because the jurors sat together to deliberate on their verdict: it was called *magna assisa*, to distinguish it from a similar proceeding in matters of minor importance. The trial by jury had been long employed in all civil questions, which were not to be tried by the duel. These proceedings were called either *assisæ* or *recognitiones*,

Spelm. Gloss. Cowel Inter. ad Voc.

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and the jurors were called *recognitores*. Questions respecting seisin were decided in this manner, and the proceedings were designated by particular appellations, as the *assisa novæ disseisinæ*, or the assize of novel disseisin; when any one was unjustly deprived of the seisin of his freehold, *assisa mortis antecessoris*, or assize of *mort d'ancestor*, which lay for one that claimed the seisin of his ancestor, who died seised in fee; *assisa ultimæ presentationis*, assize of darrein presentment, which was had at the suit of either party, when a church was void, and a dispute arose respecting the last presentation. Of these assizes, that of novel disseisin was the most important, which was distinguished by the epithet of novel, if the disseisin was done since the last eyre or circuit. As disseisin was always accompanied with more or less violence, it was, in the eye of the law, something more than a civil injury, and the party offending was dealt with accordingly. No essoin was allowed in this assize, nor any delay on the plea of minority, or vouching to warranty. If the disseisor acknowledged the disseisin, but named a warrantor, then the assize was to cease, and the person so acknowledging it was to be amerced. The warrantor being summoned, then the assize proceeded between him and the person by whom he was named, and the unsuccessful party in either case, appellor or appealed, as Glanville calls them, in the language of the criminal law, was to be amerced, &c. It appears, that in the Norman code, no warrantor could be vouched to justify disseisin. Disseisin comprehended, not merely the actually depriving a man of his freehold, but also every act which obstructed him in the free use of his freehold; so that the assize would lie for what was afterwards considered either as a nuisance or a trespass; as by throwing down a dyke, destroying a mill-pond, and the like. But we learn from a writer subsequent to Glanville, that the law not only allowed, but required a man, *incontinenter flagrante disseisinâ et maleficio*, to expel the wrong doer, that is, at least within fifteen days after the act was committed.

Glanv. l. 13. c. 2.

Ibid. c. 7.

Grand Cout. c. 94.

Bract. 162.

The assize was resorted to in other questions, besides those regarding seisin; as, whether a tenement was a *fœdum ecclesiasticum vel laicum*, or whether a person was a minor or of age, and other matters of a similar description, which, as they arose in the court when the parties were present, might, with the advice and consent of the court, be so determined. But the number of the jurors in those assizes, was not the same as in the grand assize, not being, in some cases, more than eight. They were likewise chosen by the sheriff, and were not necessarily of the condition of knights. As to the time of limitation within which the assize might be brought, it is said in the writs given by Glanville, to have been since the last voyage of the king into Normandy, which took place A. D. 1184, in the 30th year of the reign of Henry II.; but it appears that the time of limitation was not then fixed, and might therefore be sometimes greater and sometimes less.

Glanv. l. 13. c. 2.

Ibid. c. 15.

Trial by jury.

The trial by jury, in the modern sense of the word, was now partially applied to criminal matters, for it was directed by the Constitution of Clarendon, that should nobody appear to accuse an offender before the archdeacon, then the sheriff, at the request of the bishop, "faciet jurare duodecim legales homines de vicineto seu de villa, quod inde veritatem secundum conscientiam suam manifestabunt." This mode of trial was then said to be "per juratam patriæ seu vicineti, per inquisitionem vel per juramentum legalium hominum." This is first mentioned in the laws of Henry I. As a discouragement of the duel in criminal suits: it appears that a different judgment followed a conviction *per legem apparentem*, that is, by the old Saxon modes of trial, and that, by the duel; a felon who failed to purge himself, only suffered the pains of death; but if conquered in the duel, he suffered the additional penalty of the forfeiture of all his goods.

Const. Clar. c. 6.

Ante, p. 55.

Glanv. l. 14. c. 1.

Wager of law.

The old Saxon mode of trial by compurgators, was now, if not before, applied to civil matters When the tenant, in a writ of right, denied that any summons had been delivered

Glanv. l. 1. c. 9.

to him by the summoners, he corroborated his denial *duodecima manu*, that is, as before explained, by the oath of eleven besides himself. This trial was called *vadiatio legis*, and in English afterwards, wager of law; and is expressly mentioned in the laws of Henry I. by the Latin name.

Ante, p. 28. LL. Hen. I. c. 46.

Trial by proofs. Glanv. l. 5. c. 4.

The trial by witnesses or proofs, without the intervention of a jury, was still resorted to on many occasions, where the matter would admit of clear proof, or where any one wished to prove his freedom from his birth, since the duel could not be resorted to in determining questions of this kind; the party claiming his liberty, might bring any number of his nearest relations and kindred, springing from the same stock from which he descended, if their freedom was proved and recognised in court. If, however, any doubt was entertained of their freedom, it was to be tried by the vicinage, that is, by an assize.

Reg. Maj. l. 2. c. 11.

Trial by certificate. Glanv. l. 7. c. 4.

The trial by certificate, as it was afterwards called, was resorted to in cases where the evidence of the person certifying was the only means of coming at the truth: thus, when a person claimed any lands or tenements, and it was objected that he was not heir because he was a bastard; then a writ was directed to the archbishop or bishop, commanding him to inquire whether the demandant was born in lawful wedlock or not; and according to the judgment of the Court Christian concerning the marriage, the demandant gained his inheritance or lost his claim.

Trial by record. Glanv. l. 8. c. 5.

The last mode of trial mentioned in this day, was that by record; which was resorted to in cases where either party in an action for breach of final concord, denied the common chirograph; then the justices were to be summoned to appear in court, and record how the suit came to an end, which was before them; and if they concurred in their record, then their record was to be abided by. If the final concord had been made before the justices itinerant, then these justices were to make a record of the suit, with the assistance of certain discreet knights of the county, where the concord in question was made, who were present when it was entered

into, and knew the truth of the fact. If the justices concurred as to the record, it necessarily followed that their record must be abided by; but the same rule did not apply to inferior courts, for it was understood that no court, generally speaking, had a record, except the king's court; for although in some cases the county and other courts were allowed to have records, as where a suit was afterwards to be transferred to the king's court, yet every one was at liberty to take exceptions against the record, either denying the whole, or declaring that more or less was said than was contained in the record; and this he might by the oath of two or more lawful men, according to the custom of the court. Such was the law of William the Conqueror: "Qui placitat in curia cujuscumque curiæ sit, excepto ubi persona Regis est, et quis eum sistat super eo quod dixerit rem, quem nolit confiteri, si non potest disrationari per intelligentes homines, qui interfuerunt placito et videntes quod non dixerit, recuperet juxta verbum suum." This law is confirmed by one of Henry I. to the same effect: "Recordationem Curiæ Regis nulli negare licet, alias licebit per intelligibiles homines placiti."

Glanv. l. 8. c. 9.

LL. Gul. I. Norman. c. 28.

LL. Hen. I. c. 31.

It should seem that the privilege enjoyed by the king's court as above alluded to, arose from the superior dignity of the persons constituting the court, rather than from the circumstance of their having any particular memorials in writing. The practice of entering proceedings of courts upon a roll of parchment, under the name of a record, was but very partially introduced at this time. To record, in French *recorder*, from *recordor*, to call to mind, was now employed mostly in the sense of testifying on recollection, it being usual for parties to have their friends in court to witness all the proceedings, and to take minutes of them, or treasure them in their recollection, that when called upon they might record what passed in court. This practice was general, not only in England, but in other countries of Europe, as may be gathered from the assizes of Jerusalem, quoted by Mr. Stephen, which contain special directions to the litigants to this effect.

Reeves' His. i. 95.

Stephen on Pleading, Append. No. 11.

Assis. de Jerus. c. 45. 49. Stephen, ubi supra.

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Glanv. l. 8. c. 8.

No written memorial, not even a final concord, was admitted, if, in cases of dispute, it was not confirmed by the oral testimony, not only of the judges, but also of certain discreet knights, as above mentioned. If, after all, the justices entertained any doubt, and it could not be ascertained, all former proceedings, with regard to the final concord, were void, and they were obliged to be recommenced.

Co. Inst. 117. l. Ayloffe's Anc. Chart. Introd. Reeves' His. i. 96.

There appear to have been extant at this time, no such high judicial monuments, as are described by Lord Coke, which could serve as evidence in courts, unless doomsday book, and the *rotuli annales*, for recording articles of charge and discharge, and other revenue matters in the Exchequer, may be reckoned as such. When, by the progressive refinement of forensic practice, the proceedings of courts were regularly drawn up and entered by proper officers, they acquired a stamp of authenticity, that rendered them fit to be employed as indisputable judicial evidence. At the same time the privilege of making such records was confined to the king's courts, which gave rise to the distinction between courts of record and those not of record. The series of judicial records commences with the reign of this king's successor, of which extracts are in print, and are to be found in the *Placitorum abbreviatio*.

Steph. ubi supra.

Trial by charter.

Glanv. l. 10. c. 12.

Of a similar nature to the trial by record, was that by charter, the proceedings on which are mentioned in this reign. In a plea of debt, a creditor might prove his debt either *per testem idoneum*, *per duellum*, *vel per cartam*, that is, by a fit witness, by the duel, or by a charter. When the charter of the creditor, or that of his ancestor, was offered in court in proof of a debt, it might be controverted by the debtor on several grounds. He might deny the seal to be his, or that the charter was made by him or his ancestor. If he acknowledged the seal to be his, so great regard was had to a seal, that he was considered as having acknowledged the charter; but if he denied both seal and charter, it might be proved by the duel, or by a fit witness, particularly if his name was inserted as a witness in the charter, or it might be proved by producing other charters,

signed with the same seal, which were known to be the deeds of the party denying. If it were proved against him, he not only lost his suit, but he was *in misericordia* to the king; by a rule in law, that when a person said any thing in a court, which he afterwards denied, or could not bring proof of, he was *in misericordia.*

As to the proceedings of inferior courts, they were, as far as was needful for the due administration of justice, subject to the control of the king's court. Lords might, as before observed, distrain their tenants to render them the customs and services that were due; and in case of need, might apply for assistance to the king, or his chief justiciary, and a writ would issue to the sheriff, commanding him to see right done. The plea would then proceed in the county court, and if the lord proved his right, the tenant was not only obliged to render the service, but he was amerced to the sheriff; for all amercements resulting from suits heard and determined in the county courts, belonged to the sheriff. Besides, pleas of right, which belonged to the lord's court, might be removed into the county court, if the lord were proved to have failed in doing justice: or they might, at the pleasure of the king, be removed from the county court into the supreme court for a variety of causes, as on account of any doubt or difficulty which might arise in the course of the suit.

Glanv. l. 9. c. 10.

As to the judgments of inferior courts, it appears that they were liable to be falsified by any one, who declared against the court, that he had passed a judgment contrary to the allegations of the parties in the suit. In this case the court might defend its judgment by the duel, if it chose so to do; but if convicted of the charge, the lord of the court was to be amerced to the king, and to be for ever deprived of his jurisdiction.

Ibid. l. 8. c. 9.

The liberty of falsifying a judgment, was given by the Assizes of Jerusalem; but the person making the charge was bound to fight, not merely the judges, but also the suitors, one after another. By the Saxon laws, judges were punished at the discretion of the king, for maladministration of the

Assis. de Jer. c. 111.

Mirr. c. 3.

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LL. Edg. c. 3.
LL. Gul. I.

laws. By a law of Alfred, it is said that a judge who had given a false judgment, was bound to make satisfaction to the injured party, and to forfeit the rest of his goods to the king. By a law of Edgar, a judge was in such case heavily fined to the king, unless he could declare upon his oath that he knew not how to pass a better sentence. A similar law is to be found in the code of the Conqueror.

Trial by the ordeal.
Reeves' His. i. 193.
Litt. Hist. Hen. II. vol. iv. 279.

It appears that the trial by the ordeal was now falling into discredit, for by the Constitutions of Clarendon, it was enacted, that if a man was charged with murder, or any other heinous crime, he was, notwithstanding his acquittal by the ordeal, to abjure the realm within the space of forty days, and carry all his goods with him, except such as were claimed by his lord.

Military state.

As to the military state, it had undergone some change, from the introduction of the feudal system, which bound all the tenants *in capite*, and their retainers and vassals, to serve the king in his foreign as well as his domestic wars; besides which, it appears that, for the internal defence of the realm, the Saxon practice, before mentioned, of requiring every freeman to have arms in his possession, and to be exercised in the use of them, was kept up and enforced, by an express law of this prince, entitled an assize of arms.

CHAPTER X.

RICHARD I. AND JOHN.

Richard I.—Laws of Oleron.—Weights and Measures.—Capitula Coronæ.—Grand Jury.—John.—Magna Charta.—Introduction of English Laws into Ireland.—Administration of Justice.—Courts of King's Bench and Common Pleas.—Normandy lost to the Crown of England, but the Isles of Jersey and Guernsey retained.—Arbitrary Consecration of Tithes.

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ALTHOUGH Richard I. is better known as a warrior than a legislator, yet we find that he was not altogether unmindful of the subject of legislation. To him we are said to be indebted for the code of maritime law, known by the name of the Laws of Oleron, which were so called because they were instituted by him while he lay at the island of Oleron, on his return from the Holy Land. These laws, forty-seven in number, were framed for the purpose of keeping peace, and deciding controversies; and although many of them are, from a change of manners, become obsolete, yet they met with a general reception throughout Europe for a length of time, and served as the basis on which the more extended system of maritime law was afterwards framed.

RICHARD I.

Laws of Oleron.

Matth. Par. Ann. 1196. Seld. Mare claus. l. 2. c. 24.

Sullivan's Lect. 331. Henry's His. vol. iii. p. 533.

This king likewise established a common rule for weights and measures, and regulated the coinage, that it should be of the same weight and fineness. In the administration of justice, he followed the course laid down by his father, by sending his justices itinerant to every county in England; but he seems to have improved upon this plan of proceeding, by giving to those justices more minute heads of inquiry, under the name of *capitula coronæ*, &c. According to the

Weights and measures.

Brompt. 1258. Trivet. Ann. 127. Hoved. 423.

Capitula coronæ.

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directions contained in these *capitula*, the justices were first to cause four knights to be chosen out of the whole county, who, upon their oaths, were to elect two lawful knights out of every hundred or wapentake, and these two were to choose, upon their oath, ten knights, or free and lawful men, in every hundred or wapentake. These twelve together were to answer to all the *capitula*, which concerned that hundred or wapentake. They performed the office of the grand jury of modern times, and answered to the twelve thanes among the Saxons, who were appointed by the law of Ethelred to discharge a similar office.

Grand jury.

Ante, p. 32.

The justices were then to inquire of and determine all pleas of the crown, both new and old, and all such as were not determined before the king's justices, also all recognitions and pleas, which were summoned before the justices by the king's writ, or that of his chief justice, or such as were sent to them from the king's chief court. They were to inquire of escheats, presentations to churches, wardships, and marriages, belonging to the king; and also of all criminal offences, as forgery and the like.

Wilk. Ll. Anglo-Sax. 346. et seq. Reeve's Hist. i. 202.

There were some articles called *capitula de Judæis*, which were probably occasioned by the outrages committed on the Jews by the lower orders of the people. The judges were therefore directed to adjudge what revenue should be paid by the Jews to the king for protection, licence to trade, and the like. The justices of the Jews used heretofore to be Jews and Christians, but henceforward they were to be Christians only.

Hoved. ubi supra. Wilk. ubi supra. Mad. Hist. Excheq. c. 7. 2 Inst 506.

The justices itinerant went their circuits a second time before this king's death, when he delivered to them other *capitula*, with some few additions to the former. In that same year he appointed his justices of the forest to hold an *iter*, when they were commanded to summon in every county through which they passed, all archbishops, bishops, earls, barons, and all free tenants, with the chief officer, and four men of the town, to appear before them, to learn the king's commands, which were contained in certain articles

Hoved. 445. Hale's Hist. c. 7.

delivered to them, called *assisæ forestæ*, which, on account of their rigour, caused great discontent in the kingdom.

JOHN.

The reign of king John has been considered memorable on account of the grant of the great charter of liberties, well known by the name of Magna Charta, so called, as Lord Coke supposes, not so much from the quantity of the matter, as from its importance. At the same time, it is admitted on all hands, that it contains nothing but what was confirmatory of the common law, and the ancient usages of the realm, and is, properly speaking, only an enlargement of the charter of Henry I. and his successors. It was not, therefore, so much the grant itself, as the circumstances under which it was made, which, at that time, and ever since, has given such an interest to this transaction.

2 Inst. Proem.

In consequence of the discontent occasioned by the excesses and follies of this king, the barons formed a league at the close of the year A. D. 1214, at Bury St. Edmund's, in Suffolk, whence they proceeded soon after in hostile array to the king at London, demanding a confirmation of their liberties. The king was at first unwilling to yield to demands that were accompanied with such an air of menace, but finding the barons resolute in their purpose, and feeling himself straitened by his own deserted and necessitous condition, he at length agreed that a conference should be held at Runningmede or Runemede, a meadow between Staines and Windsor, which Matthew of Westminster says, was so called to denote *pratum consilii*, because it had been heretofore frequently the theatre of public deliberations.

Blackstone's Tracts. 295.

On the day appointed, namely, the 15th June, 1215, the barons came to the conference in great numbers, whilst the king was attended by a few only, who remained faithful to him. Having encamped apart like open enemies, the conference was then opened, and continued until the 19th; then some articles or heads of agreement were drawn up, and reduced to the form of a charter, to which the king's seal was affixed.

Magna Charta.

Copies of this charter, as also of the charter of the forest,

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were afterwards made in such number, that one was deposited in every county, or at least in every diocese. One copy is entered in a book, belonging to the archbishop's library at Lambeth; whence Sir Henry Spelman transcribed the articles into his *Codex Veterum Legum*, which are to be found in Wilkin's collection; but, according to Mr. Justice Blackstone, the original articles themselves, from which his copy was exactly printed, is now in the British Museum. It was in the possession of archbishop Laud, and after passing through many different hands, came at length to bishop Burnett, and afterwards to earl Stanhope, by whom it was presented to the British Museum.

Blackstone's Tracts, 297.

The articles are written on parchment, and thus endorsed in a cotemporary hand: "Articuli magne carte libertatem sub sigillo regis Johannis." They are said to be all legible and perfect, with the exception of a few letters. There are likewise supposed to be two, if not three, original copies, of which two are in the British Museum, which were found in Sir Robert Cotton's collection. A third, which was collated by Mr. Tyrrell, with Matthew Paris's copy, was, at that time, in the archives of the dean and chapter of Salisbury, but it is not extant at present.

The contents of this charter will be considered in the next reign, when it was confirmed, with some alterations, by Henry III.; this latter being the great charter, which is always referred to by writers on the laws and constitution of England, while that of John is only remembered in political history. Among the provisions contained in the charter of John, which were omitted in the subsequent charters, two are particularly entitled to notice; namely, first, that no scutage or aid was to be levied upon the subject, "nisi per commune concilium regni nostri," except in the three cases, in which, by the feudal law, the lord was entitled to them, namely, to redeem his person from captivity, to make his son a knight, or to marry his daughter; and secondly, as regards the assembling of the *commune consilium*, for this purpose it was declared, that the king would summon all archbishops,

Reeves' His. i. 209.

bishops, abbots, earls, and greater barons, "Sigillatim per literas, et præterea," it is added, "faciemus summoneri in generali per vicecomites et ballivos nostros omnes illos qui de nobis tenent in capite;" which latter passage sufficiently shows what were the constituent members of the *commune concilium* in those days, of which more will be said hereafter, in treating of parliaments. It may, however, here be observed, that the barons now claimed as a right, what they had heretofore performed as a duty, namely, their attendance in parliament; and that, by this grant on the part of the king, in compliance with their demands, they established for themselves a right to take a part at all times in the deliberations on the affairs of the nation.

Introduction of English laws into Ireland.

To this king is also ascribed the establishment of the English laws in Ireland, when, in 1171, after the reduction of the country by his father Henry II., he was sent over to govern that kingdom with kingly power. The accomplishment of this object was, however, not effected until the 12th year of this king's reign, when he again went into Ireland, and, taking with him some men learned in the laws, he assembled a parliament, and, with the consent of the Irish, ordained that English laws and customs should be there established. To this end he sent over judges, erected courts of judicature in Dublin, and other parts, and had a regular code of English laws deposited in the Exchequer of Dublin. For the regular and more effectual execution of those laws, he divided Leinster and Munster into the several counties of Dublin, Kildare, Meath, Uriel, Catherlogh, Kilkenny, Wexford, Waterford, Cork, Limerick, Tipperary, and Kerry, and appointed sheriffs and other officers to govern them, after the manner of England.

Hale's Hist. Com. Law, c. 9.
4 Inst. 349.

Administration of justice.

He appears, also, not to have been altogether unconcerned about the administration of justice in our English courts. Sir Matthew Hale concludes, from the records of pleadings and proceedings in the courts, that they were making some advances towards regularity. He is said to have imposed a

Hale's Hist. Com. Law, c. 7.

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fine *pro stultiloquio*, that is, for vicious pleading, whence arose the fines of beau pleader, *pro pulchre placitando.*

Courts of King's Bench and Common Pleas.
Hale, ubi supra.

The courts of King's Bench and Common Pleas, were evidently distinct and independent jurisdictions in this reign; but still they were not so distinct, but that common pleas were frequently held in B. R.; and, indeed, many claimed as a privilege that they should answer in a suit before no one, *nisi coram rege vel capitali justitiario suo.*

Much judicial business was still done in the county and inferior courts, as in the time of Henry II., and continued so for some time, as it brought much profit to the sheriffs.

Normandy lost to the crown of England, but the isles of Guernsey, &c. retained.
Co. 4 Inst. 286.

Although this king lost possession of Normandy, yet the isles of Jersey, Guernsey, Sark, and Alderney, which were parcels of that duchy, continued faithful to the crown of England, but were governed, for the most part, according to the laws and customs of Normandy. From the records in the Tower, we find that king John appointed twelve *coronatores juratos*, or jurats, who were to hear and determine all pleas of the crown. It appears, that the king's writ did not run in these islands, although his commission did, but the commissioners were directed to judge according to the laws and customs of the isles. These laws and customs may, for the most part, be found in the Grand Coutumier of Normandy. In after times, these islands continued so distinct, that they were not bound by acts of parliament, unless particularly named.

1 Comm. 106.

Arbitrary consecration of tithes.
Co. 2 Inst. 641.
Seld. on Tithes, c. 9.

The arbitrary consecration of tithes, which were forbidden by the laws of Edgar and Canute, was not altogether done away, or was revived during the confusions of the times. Pope Innocent III. therefore, in his decretal epistle, directed the archbishop to see that the tithes were paid to the respective parish churches.

CHAPTER XI.

HENRY III.

Confirmation of the Great Charter.—Magna Charta and Charta de Forestâ separated.—Renewal of the Confirmation.—Inspeximus of Edward I.—Cancelling both the Charters.—Their solemn Reconfirmation.—Contents of Magna Charta.—Liberty of the Church.—Liberty of the Subject.—Delays in the Administration of Justice prohibited.—Franchises.— Exactions prohibited.—Abuses of Purveyance corrected.—Tenures.—Alienation restricted.—Mortmain.—Forms of administering Justice.—Courts.—King's Bench.—Bancum or Common Pleas.—County Court and Town.—Frivolous Prosecutions prevented.—Writ de Odio et Atia.—Amercements.—Jurisdiction of the Sheriff and other Officers.—Coroner.—Constable.—Bailiff.

The reign of Henry III., like that of his father John, is interesting in a legal point of view, on account of the confirmation of the great charter, and the other legal enactments, which were made for the purpose either of declaring, confirming, abridging, or enlarging the common law.

Confirmation of the great charter. Blackstone's Tracts, 308, 309.

Although Henry III. was only nine years of age when he ascended the throne, yet the first public act which was done in his name, with the advice of William Marescall, earl of Pembroke, the king's guardian, and that of Gualo, the pope's legate, was the renewal of the great charter, with such additions and alterations as were thought necessary. This was done in a national council held at Bristol, A. D. 1216, on which occasion the articles relating to the forest were thrown into a separate charter, called the *Charta Forestæ*, as distinguished from Magna Charta. The original of this charter, which was preserved in the cathedral of Durham,

Magna Charta and Charta de Forestâ separated.

had two endorsements upon it, the one entitled, "Magna Carta Henrici Regis III.;" the other, "Carta Henrici Regis de libertatibus concessis hominibus regni sui." It was sealed with the seals of Gualo the legate, and William, earl of Pembroke, king John's great seal having been lost in passing the washes of Lincolnshire, and no seal made for king Henry till two years after. Mr. Justice Blackstone maintains, that this charter was renewed either in the second or third year of this king, with considerable additions and improvements; and in confirmation of his position, he has given the charter itself with the several variations; but nothing satisfactory can be gathered from the historians of that day on this transaction.

Blackstone's Tracts, 315.

Renewal of the confirmation.

Matt. Paris. Chr. Dunst. Hen. Knt. Ann. 1223.

In the 9th year of this king's reign, he was declared of age by a papal bull, being then seventeen years old. It was, therefore, thought expedient that he should confirm the act of his infancy; and, accordingly, after some demur on his part, and some alterations made in the charters themselves, he confirmed Magna Charta and the Charta de Forestâ, in the form in which they have been handed down to us. Of the originals of this charter, although one was sent to every county, yet, it appears, that very few are extant. But an authentic entry of the great charter is to be found in the red book of the Exchequer. The copy of Magna Charta in the statute-book is taken from an *inspeximus* of 25 Ed. I. in the statute roll, so called from the letters patent prefixed in the name of that king. "Inspeximus Chartam Domini Henrici, quondam Regis Angliæ, patris nostri, de libertatibus Angliæ in hæc verba." Then follows the copy of Magna Charta, which may be presumed to be correct, from the direction given in the stat. 13. Ed. I. that in all exemplifications of former charters, the original was to be faithfully transcribed, "de verbo in verbum sine additione, imitatione, transmutatione, vel aliquâ diminutione." Nevertheless, it varies in some particulars from the forementioned charter of 9 Henry III. If the reader wishes to read more of these variations, he will find them ably stated in Mr. Justice Blackstone's Law Tracts.

Inspeximus of Ed. I.

Blackstone's Tracts, 327.
Reeves' His. i. 253.

Cancelling both the charters.

Notwithstanding this confirmation of the charters, the king called a council three years after, to meet at Oxford, when he declared himself of full age; and taking the administration of affairs into his own hands, he, as his first step, cancelled both the charters, alleging that he had acted under the control of others. Although this measure excited much dissatisfaction, and drew forth some menaces, yet nothing further was done on the subject of the charters until the 30th year of the king, when, being in want of a supply, he was induced to yield to the wishes of the nation, by confirming them with much solemnity, in an assembly held in the great hall at Westminster. On this occasion the archbishop of Canterbury and the other bishops, apparelled in their pontificals, with tapers burning, denounced a sentence of excommunication against the breakers of the charters; when, casting down their tapers, extinguished and smoking, concluded with the execration—"So may all that incur this sentence be extinguished, and stink in hell;" upon which the king immediately subjoined, "So help me God, I will keep all these things inviolate, as I am a man, as I am a Christian, as I am a knight, and as I am a king." As the confirmation of the charters was now sought for on every occasion, the king, being with his son Edward, in the power of Simon Montfort, was obliged, in order to obtain the enlargement of his son, to set his seal to a charter on the 14th, A. D. 1264, confirmatory of the preceding charters; besides which, there were some writs and proclamations, and a general provision in the statute of Marlebridge for their observance.

Their solemn reconfirmation.

Matth. Par. Ann. 1253. Annal. Waver. Hemingford, Trivet, &c.

Matth. Par. T. Wikes. Annal. Burt. Blackstone's Tracts, 332.

The contents of this famous charter, may be considered as they respect the privileges and liberties of the subject, the law of tenures, commerce, and the administration of justice.

Contents of Magna Charta.

In the first place it was ordained, that the Anglican church should be free, and enjoy all its immunities, which was a confirmation of a similar clause in the charter of Henry I., and also of the common law. But that clause in

Liberty of the church.

1 Comm. 379.

CHAP. XI.

HENRY III.

John's charter, which gave the dean and chapter of cathedrals the liberty of electing bishops, without the consent of the king, if it were refused, was omitted in this charter.

Liberty of the subject.

2 Inst. 49.

The liberty of the subject, both as to his person and his property, was secured by a special provision in chap. 29. "Nullus liber homo capiatur vel imprisonetur vel disseisietur de libero tenemento suo nisi per legale judicium parium suorum, vel per legem terræ." By the *judicium parium* is here to be understood, either in a particular sense the trial of any baron by his peers or equals, being lords in parliament, or, in a general sense, the trial by jury; both which was in conformity with the principles and practices of the common law, as has been before clearly pointed out.

Ante, p. 55.

2 Inst. 51.

Delays in the administration of justice prohibited.

The clause "nisi per legem terræ," that is, but by the law of the land, implied that no one should be put to answer without presentment before justices, by the due process of the common law, and the old law of the land. The last clause, "nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam," is supposed to refer to the fines and oblations, which were made to the king for the purpose of obtaining justice; and which, though sanctioned by the usage of the times, was considered oppressive, and was doubtless exceedingly irregular. The ancient records of the Exchequer contain numerous instances of money, horses, or other valuables, given for the express purpose of being enabled the better to prosecute a suit; and sometimes the litigant party proffered the king a certain portion, as a half, a fourth, &c. payable out of the debts which the king, as the administrator of justice, should help them in recovering; which practice, being liable to much abuse and many inconveniences, was done away by this provision. But fines on originals being certain, were, notwithstanding this provision, continued. Bracton, likewise, alludes to the practice of tendering the demimark, as it was afterwards called, in case where the tenant in a writ of right suspected that the demandant had not alleged the seisin of his ancestor within the time of limitation, he might *dare de suo*, in order that

Hale's Hist. Com. Law, c. 7.

Bract. 373.

the time of seisin might be inquired of, which, being a regular proceeding, and sanctioned by the common law, did not come within the meaning of the statute.

Franchises.

Besides this general immunity, the ancient liberties and customs of the city of London, and other cities and towns, were confirmed by chap. 9. The franchises of London were doubtless of great antiquity, and suited to the importance of that place, which, in the time of the Romans, as well as the Saxons, was celebrated for its wealth and commerce. The citizens of London enjoyed, among other privileges, the liberty of the chase before the Conquest, for we find this confirmed to them by the charter of Henry I.: "Quod cives Londoniæ habeant fugaces suas ad fugandum sicut melius et plenius habuerunt antecessores eorum." This city was governed by portgreves long after the Conquest: Richard I. is supposed first to have given them a mayor; and king John, who granted them a charter, to be governed by a mayor, also gave them liberty to choose their own mayor. Henry III. granted to the city of London the shrievalty of London and Middlesex, and to the sheriffs for the time being, the special privilege that they should not be judged for any offence that might incur the loss of life or limb, but according to the laws of the city. The courts of the city were, as the names of many of them testify, of Saxon origin, as the hustings, which, from the Saxon *hus*, house, seat, or bench; and things or causes, signified the same as the court of Common Pleas; the wardmote answering to the hundred court; and the hallmote or folkmote, which was the *conventio civium*, something similar to the Common Hall of modern times.

Co. 4 Inst. 314.

Co. 4 Inst. 247, et seq.

As to the franchises of the Cinque Ports, which come within the statute, they are also expressly mentioned by Bracton, on account of their importance. In the time of the Saxons, there were but three of these privileged ports, which are mentioned in domesday-book, namely, Dover, Sandwich, and Romney; to these, the Conqueror is said to have added two others, namely, Hastings and Hithe; whence, from their

Bract. 118.

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number, they acquired the name of *Quinque Portus*, or Cinque Ports. Two others are said to have been added by John, but Bracton speaks only of five.

Exactions prohibited.

As many exactions had been made for erecting bridges, banks, and bulwarks, it was declared by chap. 15, that no town or freeman should be distrained to make bridges or banks, but only those who were formerly liable in the reign of Henry II. For the same reason, none were, by chap. 16, to have the exclusive right of fishing, except such as enjoyed that privilege in the reign of Henry II.; and all weirs or kidels were, by chap. 23, to be destroyed, except such as were placed on the coast. Such erections were considered as a species of purpresture, and of course were forbidden by the common law.

Abuses of purveyance corrected.

To prevent the abuses of purveyance, it was enacted, by chap. 19, that no constable of a castle or bailiff was to take corn or cattle of any one, except an inhabitant; and by chap. 20, that no knight was to be distrained to give money for keeping castle guard, if he would either do it in person or by substitute: moreover, by chap. 21, no sheriff or bailiff of the king was to take any horses or carts for the king's use, but at the old limited price. To abate the rigour with which the king's debts were exacted, it was declared by chap. 8, that neither the king nor his bailiff would seize any land or rent for a debt, nor were the pledges to be distrained, so long as the principal was of sufficient security. Before this charter, the king, by the common law, had, for his debt, execution of the body, lands, and goods, of the debtor.

Tenures.

In regard to tenures, several provisions were made, with a view of defining the feudal law, so as to abate its rigours. Reliefs, which, in the time of Henry II., depended upon the pleasure of the king, were, by chap. 2, to be fixed at the rate of the *antiquum relevium*, namely, 100*l.* for an earldom, and 100 marks for a barony. In the case of escheats, the heir was, by chap. 31, to pay the king no other relief than what he would have paid the baron. Scutage was to be taken as in the reign of Henry II. Wardships, particularly

Ante, p. 75. Mag. Chart. 9 Hen. III. c. 2.

in regard to the king's tenants, were defined, in conformity with the common law, by chap. 3, 4, 5, and 27. The king was, by chap. 22, to have the year and day of those convicted of felony, but not the waste, as in Glanville's time. The rights of widows were defined by chap. 7, much in their favour. The widow was to receive her dower without difficulty; and if it had not been assigned to her before, it was to be assigned after her husband's death, namely, a third part of all the lands of her husband, which were his during her coverture; whereby it appears that the law of dower was enlarged since Glanville's time, when a woman could only have a third of what her husband possessed at the marriage. It is also added in the last charter of Henry III. although omitted in the previous charters, that she was, before the assignment, to have her reasonable estover, that is, her sustenance allowed her; and she might, if she pleased, continue forty days after his death in the chief house of her husband, if it were not a castle. This was afterwards called her quarantine.

Mag. Chart. 9 Hen. III. c. 3, 4, 5, 27. Ibid. c. 22. Ante, p. 76. Mag. Chart. 9 Hen. III. c. 7.

Ante, p. 80.

Blackstone's Tracts, 317.

Alienation restricted.

A provision against the alienation of lands was made by chap. 32, which is not to be found in the charter of king John, or in that first given by this king, namely, "Nullus liber homo det de cætero amplius alicui, vel vendet alicui de terrâ suâ, quam ut de residuo terræ suæ possit sufficienter fieri domino fœdi servitium ei debitum, quod pertinet ad fœdum illum." The purpose of this provision was to uphold and preserve feudal tenures, which suffered much from the practice of subinfeudation; that is, of tenants making feoffments of their lands, or others to hold them of their superior lords; whereby the latter were in time stripped of their profits of wardships and marriages, which fell into the hands of the mesne or middle lords, who, being likewise thereby impoverished, were disabled from doing their services to their superiors.

Mag. Chart. 9 Hen. III. c. 32.

Blackst. ubi supra.

Another restriction was put on alienating lands, by chap. 36, whereby it was ordained, that it should not be lawful, for the future, for any one to give his land to a religious house, and to take it back again to hold of that house; nor should

Mag. Chart. 9 Hen. III. c. 36.

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Mortmain. Co. Inst. 2. 1.

it be lawful for a religious house to take lands of any one, and lease them out to the donor. This sort of alienation is called mortmain, from the two words *manus mortua*, a dead hand, so called, as Sir Edward Coke supposes, from the effect of the alienation, for that thereby the lords lost their knights' services, and their escheats, &c.; or it may, with equal propriety, be explained by supposing that, as ecclesiastical bodies consisted of members who were considered as dead in law, land holden by such persons was literally held in *mortua manu*.

1 Comm. 479.

Forms of administering justice.

The modes of administering justice, both as respects the jurisdiction of courts and their proceedings, as also the redress of injuries, were defined by this charter.

Courts. Mag. Chart. 9 Hen. III. c. 11.

One of the most important regulations on the subject of courts, is that contained in chap. 11, which ordained that "Communia placita non sequantur nostram curiam sed teneantur in aliquo certo loco," by which it was understood, that the *communia placita*, common pleas, that is, suits between party and party, were no longer to be entertained in Curia Regis, which always followed the person of the king, but were to be determined in a stationary court, whither all persons might resort. By this regulation, the distinction between the courts of King's Bench and Common Pleas, or Common Bench, as it was otherwise called, was fully established by law, although, as before observed, it had been gradually forming by practice: henceforth these courts were distinguished by different appellations; the Curia Regis being styled *Curia Regis coram ipso rege, coram nobis*, or *coram Domino Rege ubicunque fuerit*, although it still retained the old appellations of *Aula Regis, Curia Nostra*, and *Curia Magna*. This court retained these names, because, although our kings had probably for some time ceased to sit in person there, to hear and determine causes, yet the causes which were heard in that court properly belonged to the king.

Mad. Hist. Exchcq. 544. Dial. de Scacc. l. 1. Reeves' His. i. 245.

King's Bench.

Bancum, or Common Pleas.

The *Bancum*, or Bench, was called *Curia Regis apud Westmonasterium*, or *de Westmonasterio, Justitiarii in Banco sedentes*, or *Justitiarii de Banco*. The description

given by Bracton of the different courts corresponds with what has been advanced on this subject, namely, that they had become distinct courts before this time, but their jurisdiction was not defined until now. "Habet rex," says this author, speaking of the King's Bench, "plures Curias in quibus diversæ actiones terminantur, et illarum curiarum habet unam sicut aulam regiam et justiciarios capitales qui proprias causas regias terminant, et aliorum omnium per querelam, vel per privilegium, seu libertatem," whereby it appears that the King's Bench was now considered as peculiarly the king's court, where causes, which particularly concerned the king's crown and dignity, were heard, and where the causes that concerned the subjects with one another were heard only by a particular privilege. Of the justices who sat in this court, he adds, that some were "capitales generales perpetui et majores," who were near the person of the king, "a latere regis residentes," and formed a court of appeal, according to the old usage, and took cognizance of all errors in judgment of inferior jurisdictions, "qui omnium aliorum corrigere tenentur injurias et errores." In speaking of the Common Pleas, he observes, "Habet etiam curiam et justitiarios in banco residentes qui cognoscunt de omnibus placitis, de quibus authoritatem habent cognoscendi, et sine warranto jurisdictionem non habent nec coercionem," from which it is clear that the Bench had no authority but by the writs returnable there.

Bract. 103. Co. 4 Inst. 70.

The distinction of pleas, which marked the jurisdiction of the two courts, was now made in the language of modern times, namely, into *placita coronæ*, pleas of the crown, and *communia placita*, common pleas, which answered to the *placita criminalia*, and the *placita civilia*, of Glanville: the former of these, which belonged to the King's Bench, were so called, because, as Bracton observes, "spectant ad coronam et dignitatem regis;" and the latter, which belonged to the court of Common Pleas, were so named, because they were held between subject and subject in civil matters.

Co. 2 Inst. 12. Bract. 115.

Ante, p. 100.

Bract. 119.

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Salaries of the justices. Dugd. Orig. Jur. 104.

The salary of the justices of the King's Bench was 20*l.* per annum in the third year of this king, and 40*l.* in the forty-third year; that of the chief baron of the Exchequer 40 marks, of the other barons 20 marks, in the twenty-seventh year, but in the forty-ninth year 40*l.* The chief justice of the Common Pleas had 100 marks per annum. The title of *Capitalis Justitiarius ad Placita coram Rege tenenda*, was substituted for *Justitiarius totius Angliæ*. Philip Basset was the last justiciary of all England; after which, each of the courts of King's Bench and Common Pleas had a chief justice. The first, who had the appellation of *capitalis justiciarius*, was Gilbert de Preston, who by that, had his livery of robes in 1 E. 1.

Ibid. 38. Ibid. 39.

It appears that the clergy continued to practise in the secular courts in this reign, and that many dignitaries of the church were justices in the court of Westminster, notwithstanding the prohibition in the provincial and legantine constitutions, that "Nec advocati sint clerici vel sacerdotes in foro seculari nisi vel proprias causas vel miserabilium prosequentur."

Spelm. Concil. Ann. 1217.

Justices of Assize and Nisi Prius. Mag. Chart. 9 Hen. III. c. 12. Glanv. l. 13. c. 3. F. N. B. 177.

For the more speedy administration of justice, a provision was made in chap. 12, for justices to go a circuit once every year, without waiting for the justices in eyre, who usually went only once in seven years. Before the making of this statute, writs of assize of novel disseisin and *mort d'ancestor*, were returnable as in Glanville's time, *coram me vel justitiariis meis*, but now they were returnable, *coram justitiariis nostris cum in illas partes venirent:* by force of this regulation, the king, or, in his absence, the chief justiciary, sent justices into every county once a year. These justices were afterwards distinguished by the names of Justices of Assize and Nisi Prius, as will be further explained in its proper place.

County court and tourn. Mag. Chart. 9 Hen. III. c. 35.

The two courts of the sheriff, namely, *comitatus*, the county court, and *turnus*, the tourn, as they were now called, were regulated by chap. 35. The former was to be held in the accustomed place from month to month, as it

had been in the time of the Saxons, but no oftener; and the tourn was to be held twice a year, namely, after Easter and Michaelmas; and at the latter time a view of frankpledge was to be held, for the purpose of taking the oath of all above twelve years of age, who were to enter into some decennary, according to the old law.

Frivolous prosecutions prevented.

By chap. 28, provision was made against frivolous and vexatious prosecutions, wherein it was enjoined that "Nullus ballivus de cætero ponat aliquem ad legem manifestam nec ad juramentum simplici loquelâ suo sine testibus fidelibus ad hoc inductis." The *lex manifesta* here spoken of, called by Glanville *lex apparens*, referred to the trial by the ordeal, or by that of the duel, which being considered as *judicia Dei*, were supposed to bring to light that which was hidden. *Ponere ad juramentum*, was the putting a man to purge himself by compurgators in a criminal suit, or by *sectatores* in a civil suit. From this statute we may gather that no free man was to be put to any of these trials, unless the plaintiff corroborated his *loquela*, plaint or declaration, by credible witnesses. Whether this was a novel regulation, or only confirmatory of the common law, it is not possible, with certainty, to determine: but the latter supposition seems to be the most probable, because, among the Saxons, nothing could be done without witnesses, and the same practice, doubtless, prevailed as far as the violences and disorders that followed the Conquest would admit. Henceforth we find that all declarations of the plaintiff concluded with these words, *inde producit sectam*, which words continued to be used after the practice of bringing the *secta* had ceased.

Mag. Chart. 9 Hen. III. c. 28.

Spelm. Gloss. ad Voc.

The *secta* or *sectatores*, peculiarly signified such witnesses as were brought either by the plaintiff or by the defendant, which proceeding, as regarded the defendant, was, as before observed, called waging his law. The plaintiff was obliged to procure two persons as his *secta*, and the defendant double the number, in waging his law; if the plaintiff brought only two witnesses, the defendant brought four,

Bract. 410. Flet. l. 2. c. 63.

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and so for every witness of the plaintiff's, two persons, until it came to the number of twelve.

If the *secta* for the plaintiff were found, on examination, not to agree in their account, the tenant was not obliged to wage his law against that *secta*; and, on the other hand, if the complainant had proof, as instruments and sealed charters, no defence *per legem* was admitted. For wager of law was admitted only in stipulations and contracts, entered into by the agreement of the parties, as in promises, gifts, sales, and the like. It was not necessary for the *secta* to be of the same rank as the principal, provided they were trustworthy and of good repute. The tenant could not, however, wage his law by means of an attorney, instituted for that purpose, but was obliged to do it in person. Such was the practice of the courts in regard to the *secta* and wager of law, which was the subject of the statute.

Bract. 315. l.

Ibid. 410.

Writ de odio et atia.

Mag. Chart. 9 Hen. III. c. 26.

A provision against false imprisonment, or imprisonment on false charges, was made in chap. 26, in confirmation of the common law, appointing the writ *de inquisitione*, otherwise called *breve de odio et atia*, or *breve de bono et malo*, to be given gratis. This writ, which in those days was a great security for personal liberty, lay for any one committed to prison on a charge of homicide, who otherwise could not be bailed. It was directed to the sheriff, commanding him to make inquisition by the oaths of lawful men, whether the accused party was *rettatus odio et atia*, *i. e.* charged through hatred or malice; and in case it was found that he committed the deed *se defendendo vel per imfortunium*, in self-defence, or by mischance, then a writ of *tradas in ballium* might issue, commanding the sheriff, if the prisoner could find twelve good and lawful men of the county to be mainprise for him, he should deliver him into the hands of the sureties. That the writ was not introduced by statute is clear, from what Glanville observes, that persons accused of homicide, might sometimes, at the king's pleasure, be discharged on giving pledges; but by this article in the charter, it appears that the king gave up his prerogative of

Glanv. l. 14. c. 3.

refusing this writ if he thought proper; for it is added, that the writ *non negatur* should not be refused.

Amercements. Mag. Chart. Hen. III. c. 14. Glanv. l. 9. c. 11.

The practice of the courts in regard to the *misericordia* or amercement, was defined and limited by chap. 14, which ordained that no freeman should be amerced, but according to the measure of his offence, saving, in the language of Glanville, his *contenementum*, countenance, or necessary support; as for a merchant, his merchandise, or for a husbandman, his weinage, that is as much as to say, his carts and implements of husbandry. Moreover, no amercement was to be assessed but by the oaths of honest and lawful men in the vicinage. Upon this statute was grounded the writ afterwards called *de moderatâ misericordia*.

LL. Hen. I. c. 1.

This provision was confirmatory of the common law, as we learn from the laws of Henry I. which ordained that amercements were not to be assessed as they had been in his father's and brother's time, but as they had been in the reigns of their Saxon predecessors.

Jurisdiction of sheriffs and other officers. Mag. Chart. 9 Hen. III. c. 17. Co. 2 Inst. 30. Glanv. l. 1. c. 3.

As the due administration of justice particularly concerned the life and person of the subject, and ought therefore to be intrusted to persons of discretion, well versed in the laws, it was ordained, by chap. 17, that no sheriff, coroner, constable, or other bailiff of the king, should hold pleas of the crown. By this statute the authority of the sheriff to hear and determine theft and other felonies, as in the time of Glanville, was done away. This restriction, probably, reduced the jurisdiction of the sheriff to its original state, as it was in the time of the Saxons.

Coroner.

Coroner, in the Latin of the middle ages *coronator*, from *corona*, the crown, was so called because he took cognizance only of pleas of the crown, and was the principal conservator of the peace. If any credit is due to the Mirror, his office was of great antiquity, having been established by the Saxon kings; but it is most probable that such offices were established soon after the Conquest. They are first mentioned by name in this charter, although allusion is made to the office in the Capitula of Henry II., and in those given in the

Mir. c. 1. s. 3. Wilk. Leg. Anglo-Sax. 346. et seq.

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reign of Richard I. to the justices in eyre; wherein they were commissioned to choose three knights and one clerk in every county, to be *custodes placitorum coronæ.* The office of the coroner was then, as it is now, to make inquisition, when any man came to a violent or untimely death, *super visum corporis*, and to take indictments thereon; also to inquire concerning treasure trove, and to take appeals *de raptu virginum*, *de pace et plagis*, &c.

Bract. 50.

Constable.

Of the constable, a high officer of the crown, mention has already been made; but the constable here referred to was a judicial officer, who acted as a warden or keeper, as appears from chap. 19 of this charter, and other records, as the constable of the castle of Dover, or of the Cinque Ports, which was the same as the warden of the Castle and Cinque Ports.

Bailiff.

Spelm. Gloss. Du Cange, Gloss. ad Voc. Baliores.

Bailiff, from the French *bailiff*, was, properly speaking, any officer or minister who acted in the name and for another, so called, because a commission was bailed or delivered to him. The name was introduced at the Conquest, like the former word constable, and has been commonly applied to inferior officers, although the sheriff calls his county a bailiwick. For the most part, the bailiff was, and is, bailiff either of a hundred, a liberty, or a manor, &c., and as such may act for another in the place of his employer.

To this charter are added the usual words, *hiis testibus*, with a list of the greatest names in the kingdom, among the lords spiritual and temporal. This conclusion of the king's grants, with the words *hiis testibus*, was continued until the reign of Richard II. when it was laid aside in all cases, except in patents of creation. Since that time they have concluded with the words *teste me ipso*, or *in cujus rei testimonium has literas nostras fieri fecimus patenter teste me ipso.* The ancient deeds of subjects retained this form until the reign of Henry VIII.

Co. 2 Inst. 78.

CHAPTER XII.

HENRY III.

Carta de Forestâ.—Deafforesting Forests.—Privileges and Exemptions from the Forest Laws.—Right of Common.—Lawing Dogs.—Punishment of Offences against the Forest Laws.—Officers of the Forest.—Courts of the Forest.—Statutum Hiberniæ.—Statute of Merton.—Statute of Marlebridge.—Jurisdiction of Courts.—Writ of Entry.—Writ of Waste.—Process.—Proceedings in the Eyre.—Grand Jury.—Petty Jury.—Wager of Battle.—Abolition of the Ordeal.—Wager of Law.—Bracton.

Carta de Forestâ. 9 Hen. III.

The *Carta de Forestâ*, which, as before observed, was, in this reign, drawn up in a distinct form, contained the most important points of the forest law. The hardships of these laws were felt so sensibly at this period, that the defining and limiting them by express restrictions, was sought for with even more earnestness than Magna Charta itself.

Deafforesting forests.

Among the grievances which fell heaviest on the subject, by reason of these laws, was the practice which had been introduced by the Conqueror, of afforesting or converting into forests, not only the king's demesne, but also the lands of other persons. It is said by historians, that the erection of the forest occasioned the destruction of twenty-two churches and villages, besides chapels and manors, for the space of thirty miles together. In the reigns of Henry II., Richard I., and John, afforestations are said to have been made within their own and other men's grounds. To remedy this evil, the first chapter of the *Carta de Forestâ*. directed that all forests should be viewed by good and lawful men, and if it was proved that the king had any woods, except

Dial.deScac. Cap. Quid. Reg. For. Hale's Hist. Com. Law, c. 7. Cart deFor. 9 Hen. III. c. 1, 3.

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the demesne turned into forest, to the prejudice of the owner's wood, it was to be disafforested forthwith, but the royal woods were to remain forest, with a saving of the common of herbage, and other things, which had been heretofore enjoyed. The same direction was given in chap. 3, in regard to such forests as had been afforested by Richard I. and of John. The ground thus disafforested, was termed the purlieu, from the French *pur* and *lieu*, that is, a place clear and exempt. The perambulation, whereby the purlieu was disafforested, was called in the French *pouralléе*. In order to carry into effect this provision, Hugh de Neville, and Brian de Lisle, were appointed commissioners, to take inquisitions of the ancient metes and bounds of the forest, as either Henry II. or any king after him had enlarged; and in this reign there were several perambulations made, as also in subsequent reigns.

Co. 4 Inst. 305.

Ibid. 318.

Privileges and exemptions from the forest laws.

Cart de For. 9 Hen. III. c. 11.

Some privileges and exemptions were likewise either granted or confirmed by this charter: as, that any archbishop, bishop, earl, or baron, coming to the king at his command, might take and kill one or two of the king's deer, by view of the forester if he was present; if not, then he might do it upon blowing a horn, that it might not look like a theft. Also archbishops, bishops, and others, having woods in forests, were to have them as they enjoyed them at the first coronation of Henry II., and should be quit of all purprestures, wastes, and assarts, that is, digging up of the ground, which they might have committed therein before the second year of the reign of Henry III.

Right of common.

Ibid. c. 9.

The right of common was confirmed to such as had before enjoyed it: also every freeman was permitted to agist, that is, to depasture and feed off his own wood within the king's forest, and likewise take his pannage or pawnage, for which purpose he might freely drive his swine through the demesne woods; and if they lay a night in the forest, they were not to be charged any thing. Besides the abovementioned use of their own woods, freemen were permitted to make in their woods, lands, and water-courses, mill-

springs, pools, dikes, or arable grounds, provided they did not enclose such arable grounds, nor cause a nuisance to their neighbours.

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Lawing dogs.

Cart. de For. 9 Hen. III. c. 6.

As by the law of the forest, dogs were not allowed within the precincts of the forest, unless they were lawed or expeditated, as it was called, provision was made that this expeditation should be done in a less cruel manner than heretofore; that is, the three claws were to be taken off, but not the ball of the foot cut off, as had been the practice. A similar humane regulation is enjoined in regard to the expeditation of dogs, in the laws of Henry I.

LL. Hen. I. apud Wilk. c. 17.

Punishment of offences against the forest laws.

Cart. de For. 9 Hen. III. c. 10.

Manw. For. Law. pt. 2. c. 8.

Co. 4 Inst. 298.

Offences against the forest laws were not to be punished with the loss of life or limb, but only with an amercement, or imprisonment for a year and a day. If any forester found any person hunting without warrant, he was to arrest his body and carry him to prison, from which he was not to be delivered without special warrant from the king. But persons were bailable if not taken in the *mainour*, *mainœuvre*, or manner. This mainour was of three kinds, namely, stable stand, *i. e.* standing with a bow, gun, or knife, or with greyhounds, ready to shoot or course; dog-draw, that is, drawing after a deer which the dog had hurt; backbear, that is, carrying away the deer which he had killed; and lastly, bloody-hand, that is, having his hands covered with the blood of the deer which he had killed. A person not taken in the manner might be attached by his goods.

Officers of the forest.

Co. 4 Inst. 289.

Cart. de For. c. 2.

Manw. For. Law, 250.

Besides, the officers and courts of the forest were also regulated by this charter. The officers of the forest were the justice in eyre; the chief warden of the forest, next to the justice, whose office it was to bail and discharge offenders; the regarder of the forest, who had to walk over the whole forest, and view every bailiwick of the same, and certify all trespasses committed therein; the ranger, who had to drive the beasts of venery out of the purlieus into the forest; the verderor, whose office it was to look to the vert or green of the forest, and to see that it was maintained; the forester, whose business it was to see to venison and

Cart. de For. 9 Hen. III. c. 14.

vert within his walk, and to present the offences and attachments at the next court of attachments and swainmote; the agistor, who had to receive and take in cattle for agistment, and to present all trespasses committed by cattle within the forest; the beadle, an officer of Saxon origin, from *bydden*, to call or warn, who warned all the courts of the forest, executed process, and made all proclamations, &c.

Courts of the forest. Co. 4 Inst. 289. Cart. de For. 9 Hen. III. c. 8. Ibid. c. 6. Ibid. c. 8.

The courts of the forest, were the court of attachment or woodmote, held before the verderors every forty days, where the forester brought in the attachments, *de viridi et venatione*, that is, concerning vert and venison, which were certified and enrolled by the former; the court of regards, or survey of dogs, held every third year, to take inquisition of the lawing of dogs; the swainmote, held three times a year, when the agistors came together to take agistment; at which time the drift of the forest was made, that is, all the animals were to be driven together into one pound, to see that those who commoned did so with such kind of cattle, as they, by prescription or grant, ought to do. Swainmotes were, according to the charter, to be held in those counties only where they had used to be held. The last and principal court of the forest, was the court of the chief justice in eyre, who had authority to hear and determine all manner of pleas concerning vert and venison, for the maintenance of the king's game, and all manner of trees, for cover, browse, and pannage. These courts were, at that time, and for several centuries after, held very regularly, but they gradually fell into disuse, as the laws of the forest lost their force. The last court of justice, the proceedings of which are recorded, was held before the earl of Holland, in the reign of Charles I. of which the reports of Sir W. Jones furnish us with an account. After the restoration, another was held, *pro forma* only, before the earl of Oxford, which appears to have been the last.

Co. 4 Inst. 290.

Statutum Hiberniæ. 14 Hen. III.

The other public acts of this reign, were the *Statutum Hiberniæ*, passed in the fourth year of this king, for the purpose of defining to the judges of Ireland, the English

law in regard to coheiresses; the provisions, or statute of Merton, so called, because it was passed at the monastery of the canons regular of Merton, in the presence of the archbishop and most of the barons of the realm, who were assembled at the coronation of the king and his queen Eleanor, in the twentieth year of his reign; and the statute of Marlebridge or Marlborough, so called because it was passed at Marlborough in the fifty-second year. These two latter statutes contained provisions principally in regard to tenures and their incidents. From the statute of Merton, we learn that the clergy made a fruitless attempt to get the principle of the canon and civil law, in regard to special bastardy, as before mentioned, adopted into the law of England, which called forth the noted reply of the barons—"Nolumus leges Angliæ mutari." Furthermore, in order to set this matter at rest, we are informed that the king assembled a council in the same year, consisting of several lords and bishops, when it was agreed, that whenever the issue *natus ante matrimonium*, arose in the king's courts, the plea should be transmitted to the ordinary, and inquisition be made, *utrum talis natus fuerit ante sponsalia sive matrimonium vel post*, to which the ordinary was to send his answer in the very words of the requisition, without any cavil, that is, without giving any opinion. In consequence of this strict adherence to the letter of the common law, the courts began to consider, that when special bastardy was pleaded in bar of a descent, it was not needful to refer the plea to the spiritual court, as the legality of the marriage was not called in question. It appears also, from the same statute, that the barons petitioned that they might imprison such as they should take in the parks, and that they should have prisons of their own, but the petition was not granted.

In the statutes of both Merton and Marlebridge, provisions were made for the better administration of justice. The service of attending the lord's court, was regulated in favour of the suitors or tenants, so that they were admitted

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Statute of Merton. 20 Hen. III.

Statute of Marlebridge 52 Hen. III.

Stat. Mert. 20 Hen. III. c. 9.

Ante, p. 86.

Special Bastardy.

Bract. 416. 1. Reeves' His. i. 464.

Stat. Mert. 20 Hen. III. c. 11.

Jurisdiction of courts. Stat. Marl. 52 Hen. III. c. 10.

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to appear by attorney. This service, which is now, for the first time, mentioned by the name of *secta ad curiam*, or suit service, was, as before observed, a part of the feudal system, which had existed among the Saxons.

Co. 2 Inst. 120.

Archbishops, bishops, barons, and others, were exempted from their attendance at the tourn, which, while it lightened their burdens, materially lessened the dignity of this hitherto important court.

Stat. Marl. c. 11.

Fines, *pro pulchre placitando*, for beaupleader or fair pleading, that is, for not pleading fairly or aptly to the purpose, were no longer to be taken in the county court, the hundred, or the court-baron. Beaupleader, before called *stultiloquium*, was, as Lord Coke observes, as well in respect of the vicious pleading, as of the fair pleading, by way of amendment. Mr. Reeves understands by the fair pleading, specious and favourable pleading; to obtain which, the suitors were obliged to pay a fine. It appears by this statute, that only arbitrary and uncertain fines were done away, and there still remained the certain fines, which had been fixed by the rules of the superior court.

Ante, p 130. Co. 2 Inst. 123.

Reeves' His. 2. 70.

Stat. Marl. c. 20.

Ibid. c 18.

These inferior jurisdictions were, in other particulars, restricted. Pleas of false judgment, were to be held in none but the king's court, because, as the statute observes, they "specialiter spectant ad coronam et dignitatem regis." Likewise amercements, which had heretofore been taken by escheators and other officers, were henceforth to be taken only by the *capitales justiciarii*. Moreover, persons who had charters and liberties, exempting them from being empannelled on juries, were, nevertheless, to submit to be sworn in cases where right could not be done without them.

Ibid. c 14.

Writ of entry.

Some remedies were likewise now introduced, either by statute or at common law. Among these, the most important was the *breve de ingressu*, or writ of entry, which had been framed as a remedy in many cases, where an assize of novel disseisin could not be employed, as for a widow when her husband had aliened her maritagium without her consent, which was called a *cui in vita*, or for a lord to recover

his escheat, when his tenant committed felony, called a writ of escheat, and the like. This writ varied in its form greatly, according to the circumstances of the case, and lay against all who had any entry within the degrees. By the degrees, it was understood, that when the writ was *ad terminum qui præteriit*, that is, lay for the person who made the demise, that was one degree; if the writ was in the *per*, that is, if the tenant was said in the terms of the writ, to have his entry *per*, by such a one, that was the second degree; and if the writ was in the *per* and *cui*, that is, if the tenant was said to have his entry by such a one, *cui*, to whom the land in question was demised, that was the third degree; beyond this, the demandant was driven to his writ of right, until the statute of Marlebridge provided a new writ of entry, called a writ in the *post*, from the words used in the writ, "Quod idem A. non habet ingressum nisi post," such and such alienations generally, without stating the stage or degrees by which the alienation happened. This action was likewise so far limited in point of time, that if *propter longissimum ingressum*, the right of the demandant could not be proved, *proprio visu et auditu*, he was then driven to his writ of right. It is, however, worthy of observation, that the writ of *ejectione firmæ*, or a writ of ejectment, which was first introduced in the reign of Edward III. has since been employed to determine all questions of this kind.

Bract. 321. Reeves' His. i. 397.

Stat. Marl. c. 89. Co. 2 Inst. 153.

Bract. 318.

Writ of waste.

A writ of waste was given by the statute of Marlebridge against lessees for life and years, which, Lord Coke supposes, did not lie at common law; but Bracton, who appears to have written before this statute, speaks particularly on the subject, and states at large the process against a widow who committed waste.

Stat. Marl. c. 23. Co. 2 Inst. 145. Bract. 315. Reeves' His. ii. 73.

Among the disorders of those times, it appears to have become the practice for powerful men to distrain their neighbours unlawfully: wherefore, for the suppression of these evils, various regulations were made on this subject, by the statute of Marlebridge. Among other things, that a fine

Stat. Marl. c.1,2,3,4,15

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should be imposed upon such as took distress without authority, which was in confirmation of the common law, for Bracton mentions an action, under the name of *vetitum namium*, afterwards called *replevin*, which lay against such as either unlawfully took beasts or goods in distress, or detained them against gage and pledges. By a law of the Conqueror, no one could take any thing in distress, until he had sought redress at the county or hundred courts four several times. *Namium*, a Latin word of the middle ages, was coined from the Saxon *nemen*, to take.

Bract. 155.

LL. Gul. I. c. 42.

To the abovementioned statutes, may be added some few others of minor importance, as the *statutum de bissextili*, directing that the additional day in leap-year, together with that which went before, should be reckoned in law as one day; the *assisa panis et cervisæ*, and *judicium pilloriæ*, containing regulations for the sale of bread and beer; the *statutum dies communes in banco*, which related to the return of writs, and the continuance of proceedings in term; but as this act only gives directions to the justices *in banco*, how to fix the returns of writs, which they issued in the course of the suit, it leaves it doubtful by what rule they were governed, as to the return of original writs, and, consequently, as to the days of appearance allowed to persons summoned. Previous to this time, it appears to have been regulated by the distance the parties had to travel; for by a law of Ethelred, it was directed that if the party dwelt one county off, he was to have one week before he was called upon to appear; if two counties, two weeks, and so on for every county, one additional week; by a law of Henry I. it was restricted, so that it should not exceed the fourth week, provided the party was in England; but if he were beyond sea, he was allowed six weeks.

Stat. Dies Commun. in Banco. 51 Hen. III. Reeves' His. ii. 56.

LL. Ethel. c. 93. LL. Hen. I. c. 141.

Civil process.

The process of compelling appearance, though lenient towards the defendant, was far too tedious to serve the ends of justice. It consisted of a series of judicial proceedings, called by Bracton, *solennitas attachiamentorum*, each of which was severer than the one that went before, and ended

Bract. 439.

in what was called the grand distress, by force of which all the lands and chattels, *terræ et catalla*, of the defendant, were taken into the king's hands by the sheriff, who was to answer for the profits to the crown. But before it came to this, the tenant might, by a dexterous management of the essoins, protract the suit exceedingly. Nor after the defendant's appearance were delays at an end, for there would be frequent occasions for summonses and resummonses, upon all of which essoins might be cast, besides writs of *venire*, and other judicial proceedings, together with the *dies dati partibus*, which, altogether, must have occasioned such delay, as to place the issue, judgment, and execution, at an almost unlimited distance. In proportion, however, as the inconvenience of such delays was felt, the practice of the courts concurred with the legislature, in shortening the process, particularly in cases which would not bear delay, as where the subject was the fruits of earth, or any other perishable thing, the *solennitas attachiamentorum* was dispensed with; also where the lapse of a benefice was apprehended, or where the plaintiff was, from any circumstance, entitled to consideration, as a nobleman, or a merchant going abroad, and the like; but more especially widows claiming their dower, in favour of whom, express provisions were made in a statute called *dies communes in banco in placito dotis*.

Reeves' His. Engl. Law, ii. 59.

In addition to the vexations of delays, it appears, that if a defendant could not be brought into court, it was not settled in law whether a plaintiff could have any redress, or what it should be. Bracton thought that in a contract for a sum of money, it would be right to adjudge to the plaintiff the seisin of the defendant's chattels to the amount of his demand, and to give him a day, and summon the defendant; when, if he appeared, the chattels should be restored, upon his answering to the action, but otherwise the plaintiff should become owner thereof: but this seems to be delivered as his private opinion, and not laid down as a settled rule of law. So likewise, in an action of trespass, he

Bract. 440. l.

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thought that the justices should estimate the damages sustained; and the rents and chattels of the fugitive being valued, a portion was to be taken into the king's hands, as a penalty on the defendant. In either case, whether it was an action for money, or for a trespass, if the defendant could not be found, and had neither goods nor chattels, he was to be demanded from county to county, at the suit of the plaintiff, until he was outlawed. Persons so outlawed, were not, however, upon their return, or on being taken, to lose life or limb, as those outlawed for crimes, but were condemned to perpetual imprisonment, or to abjure the realm.

Proceedings in the Eyre. Bract. 115.

Criminal justice was, for the most part, administered in the country by the justices itinerant; previous to whose coming, for fifteen days at least, there issued a general summons for all persons to attend at a certain time and place. On their arrival, the first step was to read the writs for the commission, authorizing them to act. Then one of the justices, the *major*, and *discretior*, as he is termed by Bracton, propounded the occasion of their coming, and informed the whole assembly that the king commanded his liege subjects, by their faith, and as they valued their own property, to render all possible assistance in suppressing burglaries, robberies, and every sort of crime. After which, they took aside some of the leading men of the county, called by Bracton, *busones*, i. e. probably, *barones comitatus*, to whom they explained more fully the provisions made by the king and council, for the preservation of the peace, and enjoined on them, in a more especial manner, to lend their aid, by causing all outlaws, murderers, robbers, and suspected persons, that came in their way, to be arrested, and delivered over to the officers of justice; thus giving them, as it were, a commission, to act as justices of the peace, although such magistrates were not regularly instituted until some time after.

Grand jury. Bract. 116.

The bailiffs and sergeants were then sworn in open court, to choose four knights out of every hundred, who were, upon their oath, to choose twelve others, and if not knights,

twelve *liberi et legales homines*, who were neither appellors nor appealed, nor suspected of any crime. The names of these twelve were to be inserted in a schedule, to be delivered to the justices. Then one of the twelve of each hundred took the following oath: "Hear this, ye justices, I will speak the truth of that which you shall command me, on the part of our lord the king; nor will I, for any thing, omit so to do, so help me God, and these Holy Gospels." After which, every one took the oath for himself severally, in this manner: "The oath which John here has taken, I will keep on my part, so help me God, and these Holy Gospels." When the swearing was concluded, the *capitula itineris*, before mentioned, were read over to them, and they were informed that they were to be ready with their verdict on a certain day.

Petty jury. Bract. 143.

In this case they performed the office of the grand jury, but as the ordeal was now gone out of use, and cases frequently occurred, where the duel for various reasons could not be resorted to, they were called upon, under the direction of the judge, to determine the guilt or innocence of the party accused. The latter was then informed, that if he had suspicion of any of the jurors, he might have them removed; after which, being severally sworn, the judge proceeded to charge them in this manner: "This man here present is charged with homicide (or any other crime), and defends the death, and puts himself thereof upon your word, *de bono et malo*; and therefore we charge you, by the faith you owe to God, and the oath you have taken, to make known to him the truth thereof; nor do you fail, through fear, love, or hatred, but having God above before your eyes, do you declare, whether he is guilty of that with which he is charged, or not guilty; and do not bring any mischief upon him if he is innocent.

Ibid. 137.

According to their verdict, the party indicted was, for the most part, either acquitted or condemned; but if the justices had reason to suspect, that either through fear, love, or hatred, they concealed the truth, or that they were misled

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in the information they had received; in all such cases the justices used to examine the jurors very closely, in order to detect such irregularities.

Wager of battle.

So much was the trial by jury more favoured than that of battle, that even in cases where there was a certain accuser or appellor, the election was now given to a defendant in a criminal suit, or to a tenant in a civil suit, to defend himself either *per patriam*, that is, by the jury, or *per corpus*, that is, by duel. But this election was not given indiscriminately, for the justices exercised their discretion in determining what mode of trial should be resorted to. Some cases were so clear as to need no other proof; as, where the person charged with homicide was found near the deceased with a drawn knife, or where a person slept in the same room with the deceased, and raised no hue and cry: in cases of violent presumption like these, a person was not permitted to defend himself, either by a jury, by battle, or in any other manner, such circumstances being considered as a conviction of the fact. On the other hand, some cases were so dark and mysterious, that a jury not being supposed capable of knowing any thing about them, the trial by battle was resorted to, as where a person died by poison and the like.

Bract. 137.

Reeves' His. Engl. Law, ii. 25.

Abolition of the ordeal.

The ordeal, the old Saxon mode of trying the guilt or innocence of persons, was at length abolished in this reign. Being condemned by several councils, and discouraged by the clergy, directions were given in the third year of this king, to the justices in eyre, not to try persons charged with robbery, murder, or other like crimes, by fire or water; but for the present, till further provision could be made, to keep them in prison under safe custody; so, however, as not to endanger them in life or limb; and for those who were charged with inferior offences, to cause them to abjure the realm.

Dugd. Orig. Jur. 87.

Wager of law.

The other old Saxon trial, namely, by compurgators, now called *vadiatio legis*, wager of law, continued still in use in criminal, as well as civil suits.

Bract. 155.

The trial by jury in civil matters was now approaching nearer to its present form; for the assize, which was a sort of special jury, was frequently converted into *jurata*, a common jury, which, by consent of the parties, was made available to determine every matter of dispute that arose in the course of a suit. The jurors, in this case, were not subject to an attaint, as in the assize, because this mode of trial was adopted only at the request of the parties. This practice is alluded to by Glanville, and probably had partially existed at all times.

Ibid. 215.

Glanv. l. 13. c. 2.

Although but two of the statutes passed in this reign, namely, Magna Charta and *Charta de Forestâ*, are to be found in the rolls of the Tower, yet the remainder, as the statutes of Merton, Marlebridge, &c. have been delivered down by books and memorials, as genuine acts of the legislature. There are, likewise, some records of pleadings, and judicial proceedings, of this reign, and a few notes of adjudged cases, which are to be found in Fitzherbert's Abridgement; but they are only a partial, imperfect beginning, of that branch of legal learning, which has since been carried to such perfection.

Reeves' His. ii. 85.

Bracton.

The great source of legal information at this period, is the treatise so often referred to, which was written by the great luminary of the law, Henry de Bracton, and is entitled, "De Legibus et Consuetudinibus Angliæ." Of this writer, it is to be regretted, that our information is so scanty, that even the spelling of his name is not precisely known, being variously written Bracton, Britton, and Breton, &c. Mr. Prince has included him among the "Worthies of Devon," and adds, that he studied at Oxford, where he took the degree of LL.D. and applying himself to the study of the law, rose to great eminence in his profession, and in 1244, was, by king Henry III. appointed one of the justices in eyre. His work is supposed by Mr. Reeves, to bear internal evidence of having been written between the forty-sixth and the fifty-second year of this king. It was first printed in 1569 in folio, and again in 1640.

Bridgeman's Leg. Bibl.

Reeves' His. Engl. Law, ii. 86.

On the merits of Bracton's work, it would be superfluous to enlarge, as those who are best acquainted with it, know how to appreciate its worth. It has been said of this writer, as of his predecessor Glanville, that they borrowed freely from the civil law; but it is evident, from an attentive perusal of these works, that they contain nothing but what had been admitted by legal authorities into our jurisprudence. Bracton has certainly modelled his work after the systematic method of the Roman lawyers; but as to the rest, he has faithfully adhered to his title, and given nothing but what was admitted as part of the laws and customs of England.

CHAPTER XIII.

EDWARD I.

List of the Statutes.—Contents of the Statutes.—Introduction of English Law into Wales.—Introduction of English Law into Scotland.—Establishment of English Law in Ireland.—Confirmation of the Charters.—Purveyance.—Recovery of the King's Debts.—Jura Regis.—Writ of Quo Warranto.—Coinage.—Law of Entail.—Estates in Tail.—Subinfeudation.—Feigned Recoveries.—Ecclesiastical Property protected.—Fines.—Administration of Intestates' Effects.

CHAP. XIII. EDWARD I.

Edward I. has been frequently styled the English Justinian, on account of the great improvements which he made in English jurisprudence. Sir William Herle, chief justice of the court of Common Pleas, said of this prince, "Fuit le pluis sage Roy que unques fuit." Sir Matthew Hale was of opinion, that the whole scheme of English law, such as it now is, may date its existence from this king's reign.

Co. 2 Inst. 156. Hale's Hist. Com. Law, c. 7.

List of the statutes.

As the alterations in the law were principally made by parliamentary enactment, they will be best explained by considering the statutes which were passed in this reign; first giving a list of them in chronological order, and then treating of their contents.

The statute of Westminster, which was the first public act of this king, was passed in the third year of his reign, and received the name of Westm. 1. to distinguish it from other statutes of the same name. In the next year, three statutes were passed, namely, the *Statutum de Extenta Manerii; De Officio Coronatoris;* and *De Bigamis.* In the sixth year was passed the Statute of Gloucester; in the seventh, the Statute *de Religiosis*, or the statute of Mort-

main, and a statute prohibiting going armed to parliament. In the tenth year the Statute of Rutland; in the eleventh year the *Statutum de Mercatoribus*, or the Statute of Acton Burnell; and in the twelfth year, the *Statutum Walliæ*.

In the thirteenth year were passed six statutes, namely, the Statute of Westminster, called Westm. 2, the Statute of Winton, or Winchester; the Statute of Merchants; the Statute of *Circumspecte agatis*; the *Statutum Civitatis Londini*, regulating the police of the city of London; and the *Forma Concessionis et Confirmationis et Exemplificationis Chartarum*.

The *Statutum Exoniæ*, was passed in the fourteenth year; the *Ordinatio pro Statu Hiberniæ*, in the seventeenth year; and in the eighteenth year, five statutes, namely, the Stat. *Quia Emptores*, or Westm. 3; the *Statut. de Judaismo*; two statutes, named *Quo Warranto*; and the statute of *Modus levandi Fines*. In the twentieth year were six statutes, namely, the Statute of Vouchers; the Statute of Waste; the Statute *de Defensione Juris*; the Statute *de Moneta*, and the *Articuli de Moneta*. In the twenty-first year, the Stat. *de iis qui ponendi sunt in Assisis*, and the Stat. *de Malefactoribus in Parcis*. In the twenty-fourth, the Writ of Consultation. In the twenty-fifth year, the Stat. *Confirmationis Chartarum*, and the *Sententia Domini R. Archiepiscopi super Præmissis*. In the twenty-seventh, the Stat. *de Finibus levatis*, the *Ordinatio de Libertatibus perquirendis*, and the Stat. *de falsa Moneta*. In the twenty-eighth year, the Statute of Wards and Reliefs, the Statute of Persons appealed, and the Stat. *Articuli super Chartas*. In the twenty-ninth year, the Stat. *Amoveas manum*. In the thirty-third year, six statutes, namely, the Stat. *de Protectionibus*; the Stat. of the Definition of Conspirators; the Stat. of Champerty; the Ordination of Inquests; the *Ordinatio Forestæ*; and the statute for measuring of lands.

In the thirty-fourth year were passed five statutes, namely,

the Stat. *de Conjunctione Feoffatis*; a statute on the Statute of Winchester; the Stat. of amortizing lands; the Stat. *de Tallagio concedendo*, and the *Ordinatio Forestæ*. In the thirty-fifth year, were the Stat. *de Asportatis Religiosorum*, and the Stat. *Ne Rector prosternet Arbores in Cœmeterio*.

Contents of the statutes.

These statutes, as respects their most important contents, may be considered under the head of what was of a public or political nature; what related to private rights, and what concerned the administration of justice.

Introduction of English law into Wales.

Stat. Walliæ. 12. Ed. I.

One of the most important political measures of this reign was the introduction of English law into Wales, by means of the *Statutum Walliæ*, which was passed after the annexation of Wales to the crown of England. Wales, in Saxon *Brytwealas*, and in the Latin of the middle ages *Wallia*, in French *Galles*, is, in all probability, changed from *Gallia*, the Welsh, or ancient Britons, being of the same original as the Gauls or Celts. They were originally called Gualli or Gualles, from *Gualla*, a queen of the country. After their expulsion from England by the Saxons, they betook themselves to the mountains and fastnesses of Wales, where they preserved their own language, laws, and government, and were, for a long time, enabled to make a stand against their old enemies the Saxons. After the Conquest, their territories were gradually more and more straightened by the encroachments of the English, with whom they were engaged in frequent wars, but on such unequal terms, as led to their final subjugation. It was the policy of our kings to make grants to certain lords of such lands as they could win from the Welshmen, which they held to them and their heirs of the crown of England. This was the origin of the lords marchers, who exercised *jura regalia* in their respective lordships in all cases, except treason, by which means the English laws became gradually established among the Welsh. But this state of things leading to many oppressions on the part of the lords, and many outrages on the part of the oppressed natives, the king determined to put an end to these evils, and therefore set about executing the

Leg Edw. Conf. c. 35.

Reeves' His. ii. 94.

2 Burr. 836. et seq.

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great design which he had formed, of annexing all other parts of Great Britain to the realm of England. For the better effectuating this object, he acted on the principle, that Wales had all along been feudatory to the crown of England; and, accordingly, ordered Lewellyn, prince of North Wales, to do homage for his territories, and on his refusal, he marched with an army into Wales, and reduced this prince to obedience. The latter afterwards made a fresh attempt to shake off his allegiance, but was defeated and slain. His brother David, who succeeded him in the principality, experienced a worse fate; for, being made prisoner, he was tried and condemned to death, as a traitor and a rebel vassal. With him the ancient race of Welsh kings became extinct, and the principality became annexed, by a kind of feudal resumption, as Mr. Justice Blackstone observes, to the crown of England; or, as the preamble to the statute of Wales expresses it, "terra Walliæ cum incolis suis, prius regi jure fœdali subjecta, jam in proprietatis dominium, totaliter et cum integritate conversa est, et coronæ regni annexa est."

Append. to Wynne's Hist. of Wales. Barringt. Obs. Stat. 324.

1 Comm. 94.

The more effectually to blend the vanquished with the victors, Edward first made a strict inquisition into the laws and customs then prevalent in that country. Commissioners were chosen for this purpose, over whom the bishop of St. David's was appointed to preside. The certificates and returns of the commissioners are printed in the Appendix to the Laws of Hoel Dha, or the Good, the legislator of Wales, who appears to have adopted some of the laws and institutions of Alfred into his code. He distributed, in imitation of this prince, the principality into counties, hundreds, and commotes, and subdivided the commotes into manors.

Append. to Wynne's Hist. of Wales. Barringt. Obs. Stat. 105.

This inquiry was followed by the statute before mentioned, which is sometimes called the statute of Rutland, from Rutland or Rhydland, in Flintshire, where it bears date, "Apud Rothelanum die Dominicâ in medio quadragesimæ anno regni nostri duodecimo." This, though

reckoned among the statutes, was, as Mr. Barrington observes, not an act of parliament, but an act of the king in council, whereby he made regulations for the government of Wales. By this statute he abolished some of their customs, and modified the rest, so as to bring them into greater conformity with the whole.

Barringt. Obs. Stat. 104. Hale's Hist. Com. Law, c. 9.

The whole scheme of English jurisprudence, as regarded original writs, the jurisdiction and proceedings of courts, the judicial and ministerial offices of the justiciaries, sheriffs, coroners, and the like, was exactly defined thereby. Also dower was given to women in Wales, which they had not before enjoyed, but bastards were no longer at liberty to inherit as they had done. Two provisions were added, at the express desire of the people of Wales, namely, first, that the truth of a fact might be inquired of by good and lawful men of the vicinage, chosen by consent of the parties; and secondly, that in all actions for moveables, as upon contracts, trespasses, &c. the Welsh usage might still be retained, which was, that when a matter could be proved, *per audientes et videntes*, and a plaintiff brought witnesses so qualified, whose testimony could be depended upon to prove his declaration, he should recover his demand against the adverse party, otherwise the defendant should be put to purge himself.

As in this statute mention is made only of Monmouth, Carnarvon, Anglesey, and Flintshire, and the counties of Carmarthen and Cardigan, in South Wales, it is probable that the other parts of Wales were not yet sufficiently civilized or reduced, to admit of the introduction of the whole scheme of English law.

English law in Scotland.

Edward, in pursuance of his plan, likewise maintained that Scotland was holden of the crown of England. Of the early connexion between England and Scotland, we have but few memorials. The Scots, as the name Scot, Scuit, or Scythian, testifies, were descended from the Scythians or Celts, who passed over from Ireland, and colonised the northern parts of Britain. Like the other barbarous tribes that over-

Parson's Remains of Japhet, p. 109.

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ran Europe, they were split into numerous petty principalities, and were in a constant state of warfare. While the Saxons were weakened by their intestine divisions and the invasions of the Danes, the Scots were allowed to take possession of Northumberland, Cumberland, and Westmoreland, but these counties were wrested from them in the reign of Edward the Elder; after which the Scottish kings continued to hold them of the crown of England, and certainly did homage after the Conquest, if not before, for those lands, and, as some suppose, for the whole country of Scotland. Certain it is, that the claim of Edward I. was admitted by Alexander, king of Scotland, from whom he received homage and fealty; and in the controversy that ensued at his death respecting the succession, between the king of Norway, Robert Bruce, and John Baliol, the competitors submitted their claims to the decision of Edward I. as superior *Dominus Scotiæ*, who thereupon pronounced his sentence in favour of John Baliol: besides, Edward exercised the jurisdiction which resulted to him as superior lord. The court of King's Bench actually sat at Roxburgh, and on complaints of injuries done by John, king of Scotland, the latter was summoned at different times to answer in the king's court, as appears from records cited by Sir Matthew Hale. Edward likewise, in his thirtieth year, granted a charter to the town and borough of Berwick on the Tweed, under the great seal of England, notwithstanding he then had a great seal of Scotland; and in all his proceedings, he considered the country as united into one kingdom, for his grants were made "per totum regnum et potestatem nostram in terra et potestate nostra." Not only was justice administered by the king's own judges and great officers, but the forms of judicial proceedings, as the trial by jury, and the like, as also the laws themselves, were in this manner transplanted into Scotland. The statutes of Westm. 1 and 2, are to be found in the Scotch laws, in substance the same as in the English laws; and that the common law of the two countries was the same, or nearly so, has already

Matth. Par. 555. Matt. West. 193. Order, Hist. 701.

Hale's Hist. Com. Law, c. 10.

2 Burr. 851.

Hale's Hist. ubi supra.

Ante, p. 67.

been shown in a former chapter, in which Glanville and the Regiam Potestatem are compared. When Scotland came to be severed from, and independent of, the crown of England, time and circumstances naturally created new laws, or changes in the law; but, as Sir Matthew Hale observes, "It is great evidence of the excellency of our English laws, that there remain to this day so many of them in force in that part of Great Britain, continuing to bear witness, that once that excellent prince Edward I. exercised dominion and jurisdiction there."

Establishment of English law in Ireland. Dav. Discov. 102. et seq.

The introduction of English law into Ireland, was but very partially effected in the reign of king John; not extending beyond the English pale; that is, not much beyond the neighbourhood of Dublin. The wild Irish, a fierce and untractable race, were too much attached to their own laws and customs, to submit willingly to a law imposed upon them by those whom they looked upon as intruders and oppressors. Their law, therefore, which was distinguished by the name of the Brehon law, from *brehon*, Irish for a judge, continued very long in force, notwithstanding the endeavours which were made to put an end to it, and substitute the English law in its place. In the reign of Henry III. writs were issued from time to time, containing divers *capitula legum Angliæ*, and commanding their observance in Ireland as the law; concerning tenancy by courtesy; concerning the preference of the son born after marriage to the son born of the same woman before; concerning all the parceners inheriting; with several others of a like nature. The observance of such statutes as were passed in England, were, in like manner, enforced by writs sent into Ireland, not only in the reign of Henry III. but of his successor Edward I. This latter prince took further measures to ensure his object, and caused the *Ordinatio pro Statu Hiberniæ* to be made, which contains regulations respecting the king's writs, the assizes of Novel Disseisin, the king's justices, the Chancery, Exchequer, and other matter. These measures were not altogether unavailable, even at

Hale's Hist. Com. Law, c. 9.

Ordinatio pro Statu Hiberniæ, 17 Ed. I.

this period, there were many of the natives who, by their intercourse with the English, began to feel the value of English institutions, and wished to exchange the condition of vassals and tributaries to the king of England for the security and advantage of English subjects. Wherefore, we find, on the petitions of individuals, frequent grants were made by Edward I. "quod legibus utentur Anglicanis," that is, have the full enjoyment of English law, right, and protection.

Hale's Hist. ubi supra.

Confirmation of the Charters.

Stat. Forma Concessionis, 13 Ed. I st. 6.
Stat. Confirm. Chart. 25 Ed. I. st. 1.
Sententia Dom. R. Archiepis. st. 2.
Stat. de Tallag. non Conced. 34 Ed. I. st. 4.
Stat. Art. sup. Chat. 28 Ed. I. st. 3.
Stat. Ordin. For. 33 Ed. I. st. 5.

The confirmation of the charters was sought for, and obtained, by many enactments in this reign. The *Forma Concessionis*, &c. was a form of *inspeximus* to be prefixed, not only to the great charter, but also to the charters of donations by individuals. This was followed by the *Confirmationes Chartarum*, which was a more solemn and particular act of confirmation, supported by the *sententia*, &c. of the archbishop, or the form of excommunication to be pronounced twice a year against those who should advise any thing contrary thereto. As the charter of Henry III. contained no provision respecting the levying of aids and subsidies, the statute *de Tallagio Concedendo*, seems to have been passed expressly for this purpose. Besides which, the *Articuli super Chartas*, and the *Ordinatio Forestæ*, were a confirmation or enlargement of many particulars in the preceding acts. The public reading of the two charters four times a year in *pleno comitatu* was particularly enjoined.

Purveyance.

Stat. West. 1 Ed. I. c. 7.
Art. Sup. Chart. 28 Ed. I. c. 2

The matter of purveyance being open to great abuse in those days, it was restricted by several provisions in the abovementioned acts; and those who offended against them, were not only to be put out of the king's protection, but remain in prison at the king's pleasure. It appears, that both before and after the Conquest, the king had upon his ancient demesne, houses of husbandry and stock, for the furnishing the necessary provisions for his household, and his tenants did all that belonged to the tilling of the land, and getting in the stores; so that few things were wanted to

be bought for the supply of the king's household. Notwithstanding, the matter of purveyance was open to abuses, which, as we learn from a law of Canute, it was the object of the kings in those days to check. When, by the grants of the lands in ancient demesne, and the changes of the times, the king's own provisions failed, then a continual market was held at the king's gate, where an officer presided, called *clericus hospitii regis*, the clerk of the market of the king's house. "There," says Sir Edward Coke, "the king was served with better viands than by purveyors, the subject better used, and the king at far less charge in respect to the number of purveyors." When this market was discontinued, purveyors started up, who caused much discontent and ill-will by their exactions.

LL. Can. c. 67.

Co. 2 Inst. 543.

Recovery of the king's debts.

Besides the matter of purveyance, the recovery of the king's debts, and the collection of his revenue, were the subject of several enactments, in confirmation of the provisions in the great charter, and still more in favour of the subject.

Stat. West. 1, c. 19. Stat. 10 Ed. I. Stat. Art. sup Chart. 28 Ed. I. c. 12.

Jura Regia.

On the other hand, this king was also mindful of the *jura regia*, or the *privilegia regis*, as they are called by Bracton, which were afterwards known by the name of the prerogative of the crown. One of the most important of these *jura regia* was the franchises; in respect to which, the king found it needful to be vigilant, many persons, owing to the turbulence of the two preceding reigns, having got possession of the royal franchises and liberties, without any lawful title; the king, whose object was to reduce the rebellious spirit of the nobles, and to bring the kingdom into order, began to make strict inquiry into the titles by which franchises and liberties were claimed, by means of the writ of *quo warranto*; and, in order to give greater effect to this design, the statutes of the same name were passed. By the first statute it was declared, that if any should object, that they were not bound to answer without an original writ: yet, if it appeared that they had usurped any liberty upon the king or his ancestors, this objection would not avail them, but they

Stat. Quo Warranto, 18 Ed. I.

Writ of Quo Warranto.

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would be compelled to answer without an original writ, but if they said that their ancestor died seised of the liberty, in such case the king would award an original writ, summoning the party to appear "in proximo adventu nostro vel coram justitiariis cum in partes venerint, &c. ostensurus Quo Warranto tenet visum Franciplegii in manerio, &c."

Stat. 18 Ed. I. 2 Inst. 494.

Although this was nothing more than the old common-law writ and proceeding, yet, as a great number of writs were, by virtue of this statute, brought against the prelates and others of the clergy, as also against many temporal lords, it created considerable ferment and uneasiness, and was complained of in parliament; in consequence of which, the king "de gratiâ sua speciali et propter affectionem quam habet erga prælatos comites et barones, et cæteros de suo regno," thought proper to make a new statute on the subject, in favour of such as had their franchises from before the reign of Richard I.

Coinage.

Stat. West. 1, c. 15. Stat. de Moneta, 20 Ed. I. st. 4, 5, 6. Stat. de falsa Moneta, 27 Ed. I. st. 3.

Many provisions were made for the protection of the coinage. The adulteration of the coinage had risen to such a height, during the troubles in the preceding reign, as to become a great grievance throughout the realm. The genuine coin was clipped, or otherwise reduced in its legal weight, by one half, insomuch, that foreign merchants would not bring over their commodities, and every article became in consequence very dear. Besides that, immense quantities of base coin were imported from abroad, to the impoverishing of the people. The first step which the king took to remedy this evil was, to enact, that such as were taken with base coin should not be bailed. This was followed by many writs and proclamations against importing certain base coins, as pollards, crockards, and other unlawful coins; and also some statutes, enjoining all persons to receive and pay none but the lawful coin of the realm, on pain of forfeiting their lives and goods. Goldsmiths' work was also regulated by statute, which restrained them from using gold that was worse than the touch of Paris, the French coins being at that time of fine gold.

Law of entail.

Stat. de Donis cond. Westm. 2. 13 Ed. I. c. 1.

The most important statutes which affected private rights, were those which imposed restrictions on the alienation of land. The first of these, was the celebrated provision in the stat. Westm. 2, *de Donis conditionalibus*, which required that the will of the donor, according to the form of the deed of gift, manifestly expressed, was to be observed; so that they, to whom the land was given under certain conditions, were to have no power to alien it, but it was *remanere*, to remain; or, as it is now termed, to descend to their issue after their death, or to revert to the donor or his heir, in the failure of issue.

It was moreover declared, that the second husband of a woman should not claim any thing, *per legem Angliæ*, in such conditional gifts, nor the issue of such husband claim any thing by descent; but immediately upon the death of a man and woman, to whom land was given, it should revert to their issue, or to the donor or his heir. So that the law in this particular was changed from what it had been in the time of Glanville or Bracton.

That the purpose of this act might be frustrated by no legal bar, it was expressly added, that if a fine was levied of lands, given in any particular form, *ipso jure sit nullus*, it should be void. Moreover, that the heirs, or those to whom the reversion belonged, though they were of full age, within England, and out of prison, were not obliged to make their claim.

Reeves' His. ii. 165.

Such is the substance of that famous law, which was to perpetuate the possessions of the nobility in their own families, in conformity with the ancient feudal restraint originally laid on alienation, and also with a law of Alfred, which required that the will of the donor was to be observed, although, as the statute complains, there had been a deviation in practice from this law; for, before this statute, if land had been given to a man and his heirs, and the man had issue, although it died, yet the condition was supposed to be performed, and he was thought to be free to alien the land.

Ante, p 12.

Co. Litt. 19.

Estates in tail.

The estate created by this statute, being but a limited

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one, was called *fœdum talliatum*, or an estate in fee-tail, from the French *tailler*, to cut; because this estate was, as it were, cut out of the whole.

Subinfeudation.

As the restriction imposed on subinfeudation, by Magna Charta, had not remedied the mischief complained of, the statute *Quia Emptores* was passed; which required that those who purchased lands and tenements of the fees of great men, to hold of their feoffors, should henceforth hold them of the chief lord, of the same services as the feoffor had done.

Feigned recoveries.

The practice of alienating lands to religious houses, also, continued, notwithstanding the provisions against such alienations in Magna Charta; when the statute *de Religiosis* was passed, with the express view of meeting this evil, and in such comprehensive terms as it was supposed would preclude the possibility of evasion; but, notwithstanding, the parties wishing to bestow their lands in mortmain hit upon the device of suffering, in a collusive suit brought against them, judgment to go by default, and the lands to be thus, as it were, recovered from them in due course of law. To defeat this evasion, it was provided, by statute Westm. 2, that if, on inquiry, it was found that the claimants had no right to the land recovered, it should be forfeited, as it was by the statute of Mortmain.

Stat. West. 2. c. 32.

Ecclesiastical property protected.

Stat. West. 2. c. 41. Co. 2 Inst. 457.

To prevent the alienation by abbots, friars, &c. of lands, granted to religious houses, it was enacted, that, lands so alienated were, if they had been granted by the king, to be taken into the king's hands, and the purchaser to lose his purchase-money. If granted by a common person, he was to have a writ called *contra formam collationis*.

Stat. of Carlisle de Asportat. Religiosorum, 35 Ed. I. st. 1.

Co. Inst. 129. l.

Carrying ecclesiastical property out of the kingdom was prohibited by the statute *de Asportatis Religiosorum*, under pain of being punished grievously for such contempt of the king's injunction. This law was made to prevent the evil practice of the governors of religious houses levying talliages and impositions on such houses, in order to send the amount to Rome. It was levelled against religious per-

sons who were aliens, and laid the foundation of all the subsequent statutes of *præmunire*, as they were afterwards called.

Stat. Ne Rector prosternet Arbores.

Trees planted in a churchyard, were, by the statute *Ne Rector prosternet Arbores*, declared sacred property, which the rector was to preserve as such untouched.

Warranty.

Stat. Gloucester, 6 Ed. I. c. 3.

As the effect of warranty was to bar the heir from ever claiming land against the deed of his own ancestor, it was found necessary, by a particular enactment in the statute of Gloucester, to protect the interest of the heir in regard to the inheritance of his mother; so that, in case of alienation with warranty, by a person holding *per legem Angliæ*, the heir was not to be barred by the warranty from demanding and recovering, by a writ of *mort d'ancestor*, the land of the seisin of his mother. In like manner, the heir was protected from the alienation of his father's property by his mother.

Fines.

Ante, p 90.

Stat. Modus levandi Fines, 18 Ed. I. st. 4.

Fines, or final concords, which are supposed to have been real suits, as before observed, were now become a mode of conveyance; preserving, at the same time, all the forms of a real suit. From the statute, *Modus levandi Fines*, we learn the mode of levying fines, which was as follows:— When the original was delivered in the presence of the parties, a countor or sergeant was to say, "Sir Justice, *Congé d'accorder*," that was praying the *licentia concordandi*, on which a fine was due to the king. Then the justice inquired, "*Que donera?*" "Sire Robert," was the reply, naming one of the parties. When they had agreed upon a sum to be paid to the king, then the justice was to say, "*Criez la peez*;" that is, rehearse the concord, upon which the sergeant said, "The peace, with your leave, is such, that William, and Alice his wife, who are here present, do acknowledge the manor of B, with its appurtenances contained in the writ, to be the right of Robert, *come cell' que il ad de lour done*, as that which he hath of their gift, to have and to hold to him and his heirs of William, and the heirs of Alice, as in demesnes, rents, seigniories, courts, pleas, &c."

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No fine was to be levied without an original writ, returnable before four justices on the bench, or elsewhere, and in the presence of the parties, who were to be of full age, of sound memory, and out of prison. If a *feme covert* was one of the parties, she was first to be confessed of the justices, and if she assented not to the fine, it was not to be levied. The reason of such a solemnity was, because in the language of the statute itself, a fine is so high a bar, of such great force, and of so binding a nature, that it concludes, not only parties and privies, and their heirs, but also all other people in the world. By this statute is regulated the modern practice of levying fines, by way of conveying lands and tenements.

Stat. de Finibus levatis, 27 Ed. I.

Attempts having been made in the preceding reign to invalidate fines, and to render them a less valuable security, the statute *de Finibus levatis* was passed, to put a stop to this practice. Exceptions to fines were not to be acknowledged in the courts; and the notes of all fines were henceforth to be read openly and solemnly in the king's court, on certain days of the week, at the discretion of the justices.

Administration of intestates' effects. Stat. West. 2. 13 Ed. I. c. 19.

As the administration of intestates' effects had, as before observed, fallen into the ordinary's hands, the statute Westm. 2 ordained, in affirmance of the common law, that the ordinary should be bound to answer the debts of the intestate, in the same manner as the executors would have done. The same statute also gave executors an action of account, which they could not have by the common law.

CHAPTER XIV.

EDWARD I.

Administration of Justice.—Judicature in Council and Parliament.—Justices of Assize and Nisi Prius.—Justices of Oyer and Terminer.—Justices of Gaol Delivery.—Court of Exchequer.—Chancery.—Court of the Steward and Marshal.—Ecclesiastical Jurisdiction.—Benefit of Clergy.—Malpractices of Sheriffs and other Officers corrected.—Qualifications of Jurors.—Persons bailable and not bailable.—Election of Sheriffs.—The old Police restored.—Maintenance.—Champerty and other Offences prohibited.—Sergeants.—Apprentices.—Ravishment of Wards.—Disseisin.—Delays in the prosecution of a Suit diminished.—Writs of Error.—Bill of Exceptions.—Writs of Formedon.—Writ of Dower.—Writ of Waste.—Distresses.—Statute Merchant.—Writ of Elegit.—Writs of Levari Facias and Fieri Facias.—Writ of Scire Facias.—Records.—Fleta.—Britton.—Hengham's Summa Magna et Parva.—Thornton's Summa.—John de Athona.

Administration of justice. Flet. 66. *Judicature in council and in parliament.*

THE administration of justice engaged the attention of this king as much as any other subject, in regard to the proceedings of courts, the duties of officers, and the remedies of civil injuries. It appears from a cotemporary writer, that the king administered justice, not only in his own council, but also in parliament, which was now erected into a court of judicature; besides which, this king had a court *coram auditoribus specialiter à latere regis destinatis*, which office was not to determine, but to report to the king what they had heard, that he might afford a suitable remedy to the parties applying for redress.

For the better ordering of the business of the courts, the

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justices of the King's Bench and Common Pleas were directed by the statute Westm. 1 to decide all pleas that stood for determination at one day, before any new matter was arraigned, or any new plea entertained. The regular return of writs was directed by the statute Westm. 2, in consequence of an evil practice having sprung up, of receiving writs after the regular day of return, and in the absence of the parties, whereby they lost their lands by default.

Justices of Assize and Nisi Prius.

Stat. West. 2. 13 Ed. I. c. 30.

The institution of justices of Assize and Nisi Prius, commenced by Magna Charta, was now so far perfected, that its establishment is usually dated from this reign. The statute Westm. 2, since distinguished by the appellation of the statute of Nisi Prius, ordained, that two justices sworn should be assigned, before whom, and no others, should be taken all assizes of novel disseisin, *mort d'ancestor*, and attaints; and that these justices were to associate to themselves one or two of the discreetest knights of the county into which they came. The assizes were to be taken three times in the year, instead of once, as heretofore was the practice. Also, that the suitors might be spared the expense and trouble of coming up to Westminster with their witnesses, provision was made that causes should be heard there only in case the justices failed to come into the county, which, not being at that time so regularly established as it was afterwards, gave rise to the insertion of the clause, "Nisi justiciarii prius ad partes illas venerint," and also gave the name of Nisi Prius to all trials in civil suits in the eyre. Of this practice, which commenced after the passing of Magna Charta, Bracton makes express mention, "Semper dabitur dies partibus ab justiciariis de banco, sub tali conditione, nisi justitiarii itinerantes prius venerint ad illas partes." From this time, all matters not requiring great examination, were tried at Nisi Prius; but in matters of great weight and difficulty, it has been usual for the causes to be tried at the bar before all the judges of the court at Westminster, whence the trial has since been distinguished by the appellation of Trial at Bar.

Reeves' His. ii. 170-172.

Bract. 110.a. 3 Comm. 352.

Justices of oyer et terminer.
Stat. West. 2. c. 29.
Co. 2 Inst. 419.
Reeves' His. ii. 170.

Besides the institutions of justices of Assize and Nisi Prius, we also read now, for the first time, of justices *ad audiendum et terminandum*, that is, of *oyer et terminer*, as it was afterwards called. The statute calls this commission "breve de transgressione ad audiendum et terminandum," a writ for hearing and determining any outrage or misdemeanor (for *transgressio*, a trespass, is here taken in a large sense,) and enacts, that henceforth it should not be granted before any justices, except justices of either bench, and justices in eyre, unless in cases of particular enormity, where it was necessary to provide speedy remedy, and the king in his grace, thought fit to grant it. Nor was this writ to be granted to hear appeals, but in special cases, at the king's command. From the tenour of this statute, it is supposed, that this commission was heretofore granted, sometimes at the suit of the parties interested, before commissioners of their own naming, so that the commissioners were neither indifferent, nor competent in knowledge and experience. To remedy this mischief, the commission was thus restricted.

Justices of gaol delivery.
Stat. 27 Ed. I. st. 1. c. 3.

As a further improvement on the judicial proceedings of these times, justices of Assize were constituted justices of Gaol Delivery, so that prisoners might have a speedy trial, and not be detained in prison longer than was needful. In this statute, it is added, that if one of the justices was a clerk, then one of the discreeter knights of the county being associated with him, who was a layman, they two, by the king's writ, should deliver the county gaol. From this it appears, that the clergy continued, notwithstanding the prohibition before mentioned, to preside in the king's courts, only observing the old canon, "ne clericus debet interesse sanguini:" they were not to be present at any judgment of life or limb.

Ante, p. 55.

Court of Exchequer.
Stat. Rutl. 10 Ed. I.
Stat. Art. Super. Char. 28 Ed. I. c. 4.

The Court of Exchequer had hitherto entertained pleas between party and party, not directly but incidentally, as they sprung out of, or were connected with, the plea that belonged to that court, which was considered by some per-

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sons as a privilege, but, for the most part, was eyed with jealousy; wherefore we find that it was enacted, by more than one statute, that no common pleas were to be holden in the Exchequer, contrary to the great charter.

3 Rep. Pref. Seld. Diss. Flet. 529. Dugd. Orig. Jur. c. 32.

Chancery. Stat. West. 2 c. 24.

The jurisdiction of the Chancery was extended by the statute Westm. 2, to the framing of writs *consimili casu*, that is, the adapting of writs, which were employed in one case, to any other similar case requiring the same remedies, which, it seems, could not heretofore have been done without the consent of the legislature.

Flet. 75. Co. 4 Inst. 78, et seq. Reeves' His. ii. 259.

The Chancery was, at this time, principally considered in its capacity as an office, *officina justitiæ*, which, together with the great seal, was intrusted to some discreet person, as a bishop or other dignified ecclesiastic, with whom were associated *clerici honesti, circumspecti, et domino regi jurati*, who were learned in the laws and customs of England. The chief of these clerks were called *collaterales et socii* of the chancellor, and *præceptores*, or masters, because they had the direction of making out remedial writs. There were, besides, six other clerks, who were considered as *familiares regis*, and were provided with board and lodging out of the profits of the privy seal, for their trouble of writing out the writs. To these must be added the inferior clerks, stiled *juvenes et pedites*, who, by favour of the chancellor, were permitted to assist in making out the *brevia cursoria*.

Flet. 77.

As by a provision in Magna Charta, the court of Common Pleas was fixed at Westminster, so by the statute *Art. Sup. Chart.* c. 5, the king willed that the chancellor and justices *de soen banc*, should follow him, that he might have at all times near him some sages of the law, who were able duly to order all business that came into court.

Court of the Steward and Marshal.

The court of the Steward and Marshal, of which the first mention is made in this reign, was also regulated by statute.

Fleta, 66.

We learn from Fleta, that the steward, who filled the office of chief justiciary, which had been abolished in the preceding reign, determined all questions between persons in the king's

household, and administered justice without the king's writ. The court of the steward was held in the *aula regia*, and had jurisdiction of all actions against the king's peace, within the bounds of the household, for twelve miles, *ubicunque rex fuerit in Anglia*; which circuit was called *virgata regia*, or the verge, answering to the *pax regia* of the Saxons, and was so named, because it was within the government of the marshal, who carried *virga*, a rod, as a badge of his office. The steward had cognizance of all injuries, that is, trespasses; and of all criminal and personal actions, *per inventionem plegiorum prosequendo*, and was to do justice to all parties, without allowing any essoin. When sufficient pledges were found by the complainant, it was the duty of the marshal to attach the party complained of, if he was to be found within the limits of the household, otherwise he was not to be attached.

Ante, p. 39.

This court always followed the king wherever his household removed, and by its presence suspended all other commissions, whether of the eyre, the assize, gaol-delivery, or others in the county, so that when the king fixed his residence in any place, the steward used to hear and determine all pleas, which otherwise belonged to the justices of gaol-delivery; and even when the king was in France, the steward exercised his jurisdiction on offenders who were natives, notwithstanding the objections made to this proceeding on the part of the French king.

Flet. 68.

Reeves' His. ii. 250.

The steward might associate with him the *camerarius*, *hostiarius*, or *marescallus*, being knights; and what was remarkable, he had the singular privilege enjoyed by none else but the justices of Ireland and Chester, that he might delegate his judicial authority, without the special permission of the king. A power so extensive and indefinite, required to be brought within some limits, to prevent all encroachments on the jurisdictions of others, wherefore it was ordained, that the steward and marshal should hold no plea of freehold, but only of debt and covenant; where, as Lord Coke observes, both the parties were of the household, and

Brit. 10. Reeves' His. iii. 389.

Stat. Art. sup. Chart. c. 3. Co. 2 Inst. 548.

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of such trespasses only as were committed within the verge. Besides, they were to hold no plea of trespass, but that which should be attached by them before the king departed from the verge, where the trespass was committed; and if it could not be determined within the limits of the same verge, then the plea before the steward was to cease. It was moreover enacted, that the steward should not in future take acknowledgments of debts or other things, but of persons of the hortell, nor hold any other plea, by obligation made at the distress of the steward and marshal; and if they did any thing contrary to this act, it was to be holden for void. From which latter clause, it has been inferred, that the steward had found means to enlarge his jurisdiction beyond the verge.

Reeves' His. ii. 250.

The criminal jurisdiction of the steward was, in like manner, confined to the verge. In the case of the death of a man, the coroner of the county was to do what belonged to his office, in conjunction with the coroner of the king's household; and all such matters as could not be determined before the steward, were to be remitted to the common law.

Ecclesiastical jurisdiction.

Stat. Circumspecte agatis, 13 Ed. I. st. 4.

The bounds of ecclesiastical jurisdiction, which had been hitherto a subject of contest, were defined by the statute *Circumspecte agatis*, in conformity with the regulations and practices of former reigns. Also the matter of prohibitions, regulated by the statute of the Writ of Consultation.

Benefit of clergy.

Ante, p. 109.

Bract. 123.

There was one privilege which the church had long enjoyed, under the name of the *privilegium clericale*, or benefit of clergy; whereby they were so far exempted from the secular jurisdiction, that, if a clerk was arrested for homicide, or any other crime, he was delivered, on demand, to the ordinary, without making any inquisition, that he might be dealt with according to the laws of the church. But this privilege appears to have been abused, and clerical offenders were dealt with more leniently than was consistent with the ends of justice: wherefore the king enjoined the

Stat. West. 1. c. 2.

prelates, upon the faith they owed him, that those who had been indicted of such offences, by good and lawful men, should in no wise be delivered without due purgation, so that the king might have no need to provide otherwise. As a consequence of this statute, it should seem that clerks were not delivered to the ordinary, as they had been heretofore, until inquisition had been made; and if the accused was found innocent, he was to be discharged; but if guilty, his lands and goods were forfeited to the king, and his body given, upon demand, to the ordinary, who was to answer for any misconduct in this matter.

Brit. c. 4.

There was, however, one description of offenders, whom the church was disposed to exclude from the benefit of clerks; these were, by the canonists, called *bigami*, that is, persons who married more than one wife. Against such persons a constitution was made in the council of Lyons, during the papacy of Boniface VIII.; and in confirmation of this, a provision was made in the statute *de Bigamis*, which thence took its name, that if any married a widow, or married a second wife, after the death of the first, he should be deprived of the benefit of clergy, if he was convicted of any clergyable felony whatever.

Sext. Decret. l. 1. tit. 12. Stat. de Bigamis, 4 Ed. I. st. 3. c. 5.

While the higher courts were thus regulated, care was taken to keep the inferior jurisdictions within their due bounds. It had been the practice, that if any person of one city, society, or merchant guild, was indebted to some one of another city or society; and any other person of that city or guild, came into the society where the creditor was, the latter might charge him with the debt of the other; which practice, being contrary to the common law, was now put a stop to by the statute Westm. 2, chap. 23. In like manner, the lords of franchises were prohibited, by the statute Westm. 1, c. 35, from attaching persons to answer in their courts, of contrac's, &c. which had been made out of their franchise, on pain of being compelled to recompense any stranger so attached with double damages.

Flet. l. 2.

Stat. West. 2. c. 23. Stat. West. 1. c. 35.

We have seen that no party to a suit could appear by

Ante, p. 114.

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attorney, without the king's special warrant. But by the statute Westm. 2, the king *de speciali gratiâ* granted, for the quiet and good of his subjects, that they might appoint a general attorney for prosecuting their suits at any time. By this act, which relieved the parties suing from much trouble and expense, the king gave up the fees usually paid for a special permission to appoint an attorney.

Stat. West. 2. c. 10. 2 Inst. 387.

Malpractices of sheriffs and other officers corrected.

Stat. West. 1. c. 37. 39.

The malpractices and irregularities of sheriffs, eschcators, bailiffs, and other officers, were checked by various enactments; as the levying distresses by persons who were not regular bailiffs, which was made punishable as an offence against the king, by the statute Westm. 1, c. 37; the making false or negligent returns of writs, which was provided against by chap. 39 of the same statute; the appointing of persons to be jurors, who were not duly qualified, which was prohibited by the statute Westm. 2, c. 38; the returning a greater number of jurors than was wanted, in order to get money for dispensing with their attendance, which was prevented by the same statute that restricted the number to twenty-four; the unjustly seizing into the king's hands, *colore officii*, the freeholds of individuals, for which, on conviction, the offender was to pay double damages; the imprisoning persons on false indictments, in order to extort money, for which the party injured might have, by the statute Westm. 1, c. 24, a writ of false imprisonment; the bailing improper persons, which was punished with the loss of office, &c.

Stat. West. 2. c. 38.

Stat. West. 1. c. 24.

Stat. West. 1. c. 15.

Qualifications of jurors.

Stat. West. 2. c. 38.

Besides punishing the offenders, regulations were also made for the prevention of the offences. The qualifications of jurors were defined by the statute Westm. 2, c. 38, and the statute *de iis ponendis in Assisis*, namely, that they should be worth, at the least, forty shillings in the year; also, by statute *Art. sup. Chart.* c. 9, it was enacted, that such persons should be put on inquests as were next neighbours, most sufficient, and least suspicious. What persons were bailable, and what not, were defined by statute Westm. 1, c. 15; the former comprehending all such as were

Persons bailable and not bailable.

Stat. West. 1. c. 15. 27.

charged with the minor offences. Sheriffs and bailiffs were prohibited, by *Art. sup. Chart.*, from letting their bailiwicks, and by the statute Westm. 1, c. 27, from taking any other fees than those which were allowed. The election of sheriffs was left to the people, according to ancient usage; but they were required to choose none but substantial knights, who were able and willing to discharge the duties of the office with integrity. The accounts of bailiffs, chamberlains, and other receivers, were, by the statute Westm. 2, c. 11, to be audited; and if they were found in arrear, they were to be imprisoned; and if they fled, their goods were to be seized, and they were to be outlawed.

Stat. Art. sup. Chart. c 14.
Stat. West. 2. c. 11.
Election of sheriffs.
Stat. Art. sup. Chart. c. 13.
Stat. West. 2. c. 11.

For the prevention of crimes, which were on the increase, the old Saxon law of police was enforced by the statute of Winchester, with many additional provisions. Hue and cry was to be solemnly made in all counties, hundreds, markets, and fairs; and escapes were to be prevented by making fresh suit. Jurors convicted of being in league with felons, or of being receivers, were to be punished at the discretion of the justices; so, likewise, sheriffs or other officers, showing favour to offenders, or concealing offences, were to be imprisoned a year, and pay a heavy fine.

The old police restored.
Stat. of Winton, 13 Ed. I. st. 2.

Judging from the enactments of this reign, it should seem, that malpractices were not confined to the inferior officers, for several statutes were made against maintenance, champerty, barretry, conspiracy, embracery, collusion, and deceit, and directed against the highest officers of the court, as the chancellor, treasurer, justices, &c. who were forbidden by *Art. sup. Chart.* c. 11, to take any part in such things, under pain of being punished at the king's pleasure.

Maintenance, champerty, and other offences prohibited.
Stat. West. 1 c. 25. 28. 31.
Stat. West. 2. c. 36. 39.
Stat. Conspirators, 33 Ed. I. st. 2.
Stat. Champerty, 33 Ed. I. st. 3.
Stat. Art sup. Chart. c. 10, 11.

The bearing up or upholding of quarrels or sides, to the disturbance or hindrance of common justice, was signified by the general term maintenance; and when this was done, with a view of having a part of the thing in plea or suit, it was then named champerty *cambi partia*, or *campi partitio*, that is, a sharing of the spoil. Barretry, from the French *barrateur*, a cheat, was the name given to the

Co. Lit. sect. 368.

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taking and keeping possession of houses, lands, and goods, on false pretences. Conspirators are defined by the statute, to be "such as confeder and bind themselves together by oath, covenant, or other alliances, that they would aid each other in indicting, and falsely moving, and maintaining pleas, &c." By embracers, are understood false informers. Collusion or deceit was, when any one, in prosecuting a suit, attempted to deceive the court or party. If sergeants or countors were convicted of this offence, they were to be imprisoned for a year. Other offenders were, besides imprisonment, to be punished at the king's pleasure.

Sergeants. Flet. l. 2. c. 37.

Whether sergeants, *servientes*, and countors, *narratores*, were a distinct order of lawyers, is not certain; but, probably, the latter were a particular description of sergeants, who were called sergeant-countors, i. e. *narratores*, from the *narratio*, count or declaration, which was the foundation of the suit. Sergeants, though now mentioned for the first time by that name, are supposed to have been a distinct order of lawyers at a very early period. Matthew Paris, in his life of John, abbot of St. Alban's, speaks of advocates at common law, or countors, as a description of persons well known in his days, *quos banci narratores vulgariter appellamus*. That the coif was in use at that time, is shown from the case of one William de Bussy, who, being called to an account for malpractices, claimed the benefit of his order or clergy, which being then a secret, it is said, that in order to prove the truth of his assertion, he loosened his coif, that he might show his tonsure.

Reeves' His. ii. 128. 284.

1 Comm. 24. Spelm. Gloss. ad Voc. Wynne's Eunom. p. 109. Barringt. on Stat. 20 Ric. II.

Apprentices. Plac. Parl. 20 Ed. I.

The statute speaks also of apprentices, that is, students in the law, who, by an ordinance in the 20th year of this king, were first permitted to practise in the King's Bench, in order to qualify themselves, in course of time, to become *servientes*, sergeants. In this ordinance, the king especially directed John de Mettingham, the chief justice of the Bench, and the rest of the justices associated with him, to provide and appoint, according to their discretion, from every county, "Attornatos et apprenticios qui curiam se-

Dugd. Orig. Jur. 35. 143. Reeves' His. ii. 284 Steph. on Plead App. No. 8.

quantur et se de negotiis in eadem curiâ intromittent, et alii non."

There are two writs alluded to or mentioned for the first time in this reign, which affected the prerogative of the crown, as well as the rights of the subject. The first of these writs, afterwards called an *ad quod damnum*, was, according to the *ordinatio de libertatibus perquirendis*, to be directed to the escheators, in case any one wished to purchase a new park; or religious men would amortise lands or tenements, to inquire whether it would be to the damage of the king, or of others, should he permit such a one to alien in mortmain, or otherwise sell his land.

Reeves' His. ii. 230. Ordinatio de libertatibus perquirendis. 27 Ed. I. st 2.

The other writ was now called an *amoveas manum*, grounded on a statute of the same name, which ordained that in all cases where it appeared by an inquest, taken before the king's escheators, that the land did not belong to the king, a writ should be immediately sued out of Chancery, commanding the escheators *quod manum suam amoveant omnino*, and cause the land, with the fruits and issues thereof, to be restored to the right owner.

Stat. Amoveas manum. 29 Ed. I.

As to the remedies furnished by statute for civil injuries, the ravishment or taking away of wards was visited with heavier penalties. By the statute Westm. 2, c. 35, the ravisher, though he restored the ward unmarried, or paid off the marriage, was nevertheless to be punished with two years' imprisonment. If he did not restore her or make compensation, he was obliged to abjure the realm, or suffer perpetual imprisonment. Upon this statute was grounded the writ afterwards called the Writ of Ravishment of Ward. Mention is also here made of the writ *de Transgressione*, which lay for one who complained of being ejected from his wardship. This was afterwards called a writ *de Ejectione Custodiæ*.

Ravishment of wards. Stat. West. 2. c. 35. Co. 2 Inst. 443.

The writ of Novel Disseisin was extended, by statute Westm. 2, c. 25, to matters regarding estovers of wood, delivery of corn, and many other cases, for which there had hitherto been no redress by the assise. It was also given, by

Disseisin. Stat. West. 2. c. 25. Stat. West. 1. c. 48.

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statute Westm. 1, c. 48, to an heir against his guardian, who did any thing to his disinherison; and, in case he could not sue for himself, his *prochein amy*, or any of his next friends, might, by the statute Westm. 2, c. 15, be admitted to sue for him. By other statutes, it was enacted that the writ should not abate from the nonnage of either party, and damages were awarded against the disseisor. Cases of re-disseisin were visited with heavier penalties than those inflicted by the statutes of Merton and Marlebridge. It appears, also, that costs of suit were now first given in assizes of Novel Disseisin and *Mort d'Ancestor*.

Stat. West. 2. c. 15. Stat. West. 1. c. 47. St. Glouc. c. 2. Stat. Merton, c. 3. Stat. Marlb. c. 28. Stat. Glouc. c. 1. 2 Inst. 288.

Delays in the prosecution of a suit diminished. Stat. West. 1. c. 40. 46. Stat. Glouc. c. 10. Stat. de Pr. 33 Ed. I. Foed. int. Edw. and Guth. c. 1. LL. H. I. c. 13. Ibid. c. 43.

Many provisions were made for preventing unnecessary delays in prosecuting a suit, particularly by shortening the process, lessening the number of essoins, restricting the vouching to warranty, and limiting protections, which were often procured to the hindrance of justice. This latter impediment to justice arose from a prerogative of the crown, which was known among the Saxons by the name of *cyninges handgrith*, that is, peace and protection under the hand of the king. The violator of such a protection was, by a law of Henry I., to be amerced, and, by another law of this king, no one who was impleaded by another was bound to answer until he had satisfied the king. Hence it had become usual to grant writs of protection to parties claiming to be in the king's service, whereby they were protected from all suits in the king's courts. To remedy the inconveniences resulting from these privileges, the adverse party was, by a statute in this reign, allowed to challenge the protection, upon its being shown in court, and aver that the person was within the four seas; and if, on trial of the averment, the verdict was against the party that cast the protection, and he was tenant in the action, the protection was to be turned into a default, and, if demandant, he was to lose his writ.

Stat. de Protectionibus. 33 Edw. I.

Stat. West. 2. c. 31.

Writs of Error.

There was one provision made by the statute of Westm. 2, c. 31, which, although it tended to delay, was probably considered as a necessary check on the judges at that time. This statute took away from the judges the discretionary

power of refusing exceptions when offered, and directed, that when any one was impleaded before the justices, and proposed any exceptions to the judgment of the court, which the justices would not allow, then he might write down the exception, and pray the justices to put their seal to it, when the king, upon complaint made, would command the justices to examine whether the exception ought to have been made or not. Before this statute, a writ of error might have been had at common law whenever there was error in the record, as has been before observed; but, when the justices overruled the exception, it was never entered on record, and of course no writ could be had. After this statute, most points of law, whether on the record or not, might be examined by a writ of error.

Bill of Exceptions.

Co. 2 Inst. 426.

On the statute *de Donis* were grounded those writs known by the general name of Formedon, from the words *formam doni* in the writ: the first of these was afterwards called a formedon in the descender, which lay for the issue, when he was deprived of his inheritance, in violation of the statute; the second was called a formedon in the reverter, which lay for the reversioner, or him to whom the land came by reversion; and the last a formedon in the remainder, which lay for the remainder man.

Writs of Formedon.

A writ of Dower was given by the statute Westm. 2, c. 4, in favour of a widow, where it was objected to her that her husband lost the land by judgment. If, on inquiry, it was found that he lost by default, and that he had a right to the land, then the widow might recover her dower.

Writ of Dower.

In addition to the enactments on the matter of waste, a writ was given by the statute Gloc. c. 5, against a tenant *per legem Angliæ*, for term of life or years; also, a writ of estrepement was given in the city against any tenant committing waste *pendente lite*. Estrepement, like the English word strip, signified a particular manner of making waste by laying bare the trees, &c. Besides, when a tenant in fee farm suffered the land to lie fresh for the space of two or three years, so that no distress could be found thereon,

Writ of Waste.

Stat. Glouc. c. 5.

Bract. 316. Co. 2 Inst. 29.

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Cessavit per Biennium. Stat. West. 2. c. 21.

whereby to compel a render of the farm or rent, a writ called a *Cessavit per Biennium* was given to the lessor, which was in the nature of a writ of right, and was extended by the statute Westm. 2, c. 21, to all cases where the accustomed services were withheld from the lord for two years.

Distresses. Stat. West. 1. c. 16, 17. 23. Stat. West. c. 2. 37.

Several provisions were made by the statute Westm. 1 and 2 on the subject of distresses to remedy the various abuses to which they were exposed. Among other things it was enacted that if the cattle of another were driven into a castle, and withheld against gage and pledges, the sheriff was to take the *posse comitatus*, and compel deliverance, and the king would cause the castle or fortress to be beaten down for the contempt, and the owner of the beasts was to be recompensed by the distrainer with double damages, &c.

Stat. Acton Burnell, 11 Ed. I.

For the support of credit, and the benefit of commerce, the statute of Acton Burnell provided that a merchant who wished to secure his debtor before the mayor of London, York, or Bristol, there to acknowledge the debt and day of payment, the recognizance was to be entered on the roll by the clerk, who was to make a writing obligatory, to which the seal of the debtor was to be affixed. If the debtor did not keep his day of payment, then the mayor should immediately cause his chattels and devisable burgages to be sold to the amount of the debt. If the debtor had no moveables, then his body was to be taken, and kept in prison, until he or his friends had made agreement with the creditor. By the statute of Merchants, the lands of the debtor, as well as his goods, were to be delivered to the creditor by a reasonable extent, to hold them until such time as the debt was wholly levied, when the land was to be restored. Upon this statute

Extent.

was grounded the process afterwards well known by the name of an extent, or *extendi facias*, from the words of the writ directing the sheriff to cause the lands to be appraised to

2 Inst. 19 Gilb. Exch. 126. c. 9.

their full extended value. Lord Coke supposes that this writ was framed after the statute 33 Henry VIII., by which all obligations made to the king were to have the same force.

and consequently were to be recovered by the same process, as a statute staple; but others are of opinion that the writ was of a much older date.

Statute Merchant.

A recognizance entered into with all the formalities prescribed by the statute was in aftertimes called a Statute-merchant, and the person who held lands in execution for payment of his debt was called Tenant by Statute-merchant.

Stat. West. c. 18.

By the statute Westm. 2, c. 18, a general provision was made that when a debt was recovered or acknowledged, or damages adjudged, the plaintiff should have his election to have a writ either "quod vicecomes faciat fieri de terris et catallis," or "quod vicecomes liberet ei omnia catalla debitoris (exceptis bobus et affris carucæ,) et medietatem terræ suæ, quosque debitum levatum fuerit per rationabile pretium et extentum." The writ grounded on this statute was called a writ of *Elegit*, for when the plaintiff or cognusee prayed this writ, the entry on the roll was "quod elegit sibi executionem fieri de omnibus catallis et medietate terræ," whence the writ derived its name. By this writ the creditor was to hold the half of the lands in his hands until the whole debt and damages were paid; and the person holding land in such case was afterwards called tenant by *elegit*, for whom the statute provided, that, in case of being ejected from his tenement, an assize of novel disseisin should lie. Thus, says Mr. Reeves, was land contrary to the policy of the feudal institution made liable to answer for debts.

Writ of Elegit.

Reeves' His. of Eng. Law, ii. 162.

It is supposed that, before this statute, by the common law, where a person sued execution upon a judgment for debt or damages, he should not have the body of the debtor nor his lands (except in special cases), but only his goods and chattels, and his corn, and what was growing upon the land, for which purpose the law gave him two several writs, namely, one called a *Levari facias*, whereby the sheriff was commanded "quod de terris et catallis ipsius A levari facias," and the other called a *Fieri facias*, which was only "de bonis et catallis."

Co. 2 Inst. 395.

Writs of Levari facias and of Fieri facias.

As all these writs were to be sued within a year and a day

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Writ of Scire facias. Stat. West. 2. c. 45.

after the judgment, the statute Westm. 2, c. 45, furnished a remedy to the plaintiff who had omitted to sue out execution within that period, by means of the writ called *Scire facias*, directed to the sheriff, commanding him "quod faciat scire" the party complained of, that he should appear at a certain day, and show cause why execution should not be done, and if he did not appear, or could not show sufficient cause, then the sheriff was to do execution.

Besides the abovementioned statutes, some parliamentary enactments were made in regard to crimes and punishments, which will be considered hereafter, under the head of Criminal Law. It is, however, worthy of observation, that this king showed his solicitude for the due administration of justice, not only by making salutary regulations, but by a strict observance of the conduct of those to whom he committed the administration of the law. At one time all the judges, except two, are said to have been convicted of corrupt practices, and the fines imposed upon them amounted to 100,000 marks. Among the offenders was the famous Ralph de Hengham, who, according to some accounts, was fined 7000, and according to others 800, marks, for having altered the record of a fine on a poor man from 13*s.* 4*d.* to 6*s.* 8*d.* This timely severity, in a lawless age, doubtless contributed to make judges more circumspect in their conduct, and thus raised their character materially in public estimation.

Holingshead Chron. l. Wikes' Chron. Parl. Hist. i. 93.

Records.

Of the decisions of courts, more will be said in the next reign. The judicial records began now to be a great source of legal information. The *Placita Parliamentorum*, collected and published by Riley, contain many records of proceedings before the king in council; but the rolls of judicial proceedings in the King's Bench and Common Pleas, as also in the Eyre, serve particularly to evidence the learning and acuteness of those times. The pleadings handed down in these records are very short, but very perspicuous, without involving the matter in a multiplicity of words. There are some reports of the terms and years of this king extant,

Reeves' His. ii. 279.

which are very brief, clear, and orderly, but they are not to be found in a regular series. Besides some broken cases in Fitzherbert's Abridgment, there are some reports in MS. in the library of Lincoln's Inn.

Fleta.

The law treatises of this reign likewise serve to show that an increasing attention was now paid to the subject of the law. The first of these is the work entitled *Fleta seu Commentarius Juris Anglicani*, which is supposed to have been written before the thirteenth year of this king, and not much later, if we may judge from the author's silence on all the statutes subsequent to that of Westm. 2. This treatise was so entitled, as the author himself informs us, because it was written during his confinement in the Fleet prison, whence it has been concluded that he was one of those judges who fell under the displeasure of the king.

It is a general treatise on the law, written in Latin, in the method of Bracton, whom he follows both in the manner and the matter, giving as it were a compendium of that author, with the alterations that had taken place since his time. It is divided into six books, the first of which treats of the rights of persons and pleas of the crown; the second, of courts and officers; the third, of the method of acquiring titles to things; the fourth and fifth, of actions grounded upon a seisin and writs of entry; the sixth, of a writ of right.

Seld. Diss. ad Flet.

Bridgeman's Leg. Bibl.

The original publication of this work took place in 1647, from a very ancient MS. discovered by Mr. Selden in the Cottonian library, being the only one that was extant. It was reprinted in 4to. in 1685, and, notwithstanding the labours of the learned editor, it is said to be still very incorrect. To these two editions are annexed, Mr. Selden's Dissertation on Fleta, and a small treatise written about the time of Fleta, which is a collection of notes relating to proceedings in actions, written in old French.

Britton.

The small French tract, under the name of Britton, has, from the similitude in the name, and the still greater similarity in the contents of the work, been looked upon as an abridgment of Bracton, interspersed with some new matter. By

some it has been attributed to John Breton, bishop of Hereford, and a judge; but, as he is said to have died in the third year of this king, and this treatise makes mention of later statutes, this supposition is rendered doubtful. It is written in the person of the king, and being, in all probability, published under his auspices, it has on that account acquired a proportionate value in public estimation. Britton was first printed in Latin by Redmann, in 12mo., without date, with an English epistle to the reader in favour of this oracle of the law. A second edition was published by Wingate, in French, in 12mo., 1640, and an English translation, illustrated with notes, was published by Robert Kelham, Esq., 8vo.

Bridgeman's Leg. Bibl.

Hengham's Summa Magna et Parva.

Ranulph de Hengham, chief justice of the King's Bench in the sixth year of this king, who, for his misconduct, was degraded from his office, with other of his fellow justices, is the reputed author of a treatise divided into two parts, called *Summa Magna* and *Summa Parva*, which treat of the ancient forms of pleadings in essoins and defaults. This work is said to have been translated into English in the time of Edward II. or Edward III., and was published by Mr. Selden, with some original notes of his own.

Nichols'His. Lib. p. 228. Bridgeman's Leg. Bibl.

To this writer are ascribed two other tracts, entitled *Summa Judicandi Essonia* and *Summa quæ dicitur quod sit Necessarium, &c.*, described by Bishop Tanner in MS. He is likewise said by Dugdale to have composed a register of writs, probably the work known by the name of *Registrum Brevium* or *Registrum Cancellariæ*, pronounced by Lord Coke to be the oldest book in the law.

Dugd. Orig. Jur. 59.

Co. 4 Inst. 140.

Thornton's Summa.

Gilbert de Thornton, chief justice of the King's Bench in the eighteenth year of this king, was the author of a *Summa*, or Abridgment of Bracton, of which Mr. Selden met with a copy in Lord Burleigh's library. Several of the chapters are wanting in this copy, and it should seem that no other copy has yet been discovered.

Selden's Dissert. ad Flet. Nichols' Hist. Lib.

John de Othona.

The most important work on the canon law was the Commentary of John de Othona on the Legatine Constitutions of Cardinals Otto and Ottobone passed in the last reign, which

laid the foundation for the body of canon law used in our ecclesiastical courts.

The title of *Capitalis Justitiarius*, which was assumed by the chief justice of the King's Bench in the former reign, was now conferred on the chief justice of the Bench or Common Pleas. The salaries of the judges were still very small. Thomas de Weyland, chief justice of the Bench in the seventh year of this king, had but 40*l.* per annum, and the other justices there but 40 marks.

Dugd. Orig. Jur. 39.

CHAPTER XV.

EDWARD II.

Statutum de Militibus.—Articuli Cleri.—Statute of Sheriffs.—Statute of Gavelet.—Statute of York.—Statute of Carlisle.—Statute de Prærogativa Regis.—Wardship.—Marriage.—Primer Seisin.—Dower.—Parceners.—Wardship of Married Women. Alienation without Licence.—Advowsons.—Idiots and Lunatics.—Wreck.—Jetsam, Flotsam, and Ligam.—Royal Fish.—Treasure-trove.—Waifs and Strays.—Decisions of Courts.—Descents.—Exclusion of the Half-blood.—New Writs grounded on the Statutes.—Writs at Common Law.—Action of Debt.—Action of Covenant.—Action of Trespass.—Pleading in Person.—Pleas. Declaration.—Commencements and Conclusions.—Issue.—Demurrer.—Days of Appearance.—Imparlance.—Rules of Pleading.—Specimen of Pleading.—Vetera Statuta.—Records.—Rolls of Chancery.—Master of the Rolls.—Year Books.—Mirror.—Inns of Court.

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NOTWITHSTANDING the troubles of this reign, Edward II. was not unmindful of the subject which had so much engaged the attention of his father. Of this we have memorials, not only in the statutes which were passed, but also in the reports of judicial proceedings, and the decisions of courts.

Stat. de Militibus.

The first public act of this reign is said to have been a writ granted by the king in parliament, which being entered, by his direction, on the record, acquired the force of a law, and is now placed among the statutes, under the title of the *Statutum de Militibus*, the object of which was to abate that part of the feudal system, which required every one possessed of a *fædum militare* that he should *suscipere arma*, that is, take upon him the order of knighthood. In the second year of this king was passed an act for enforcing the

statute *Art. sup. Chartas*, and in the year following another, entitled *Literæ Patentes*, &c. in order to enforce the observance of the statute *De Asportatis Religiosorum*, passed in the last reign. In the ninth was passed the famous statute of Lincoln, called the *Stat. Articuli Cleri*, the object of which was to adjust the long-disputed claims of ecclesiastical jurisdiction. In the reign of Henry III., Boniface, younger son of Thomas, earl of Savoy, archbishop of Canterbury, and uncle to Queen Eleanor, aimed at enlarging the boundaries of ecclesiastical jurisdiction, and made several canons and constitutions, which tended to encroach on matters belonging to the common law, as the trial of the limits and bounds of parishes, the right of patronage, trial of right of tithes by *indicavit*, and other things of a similar nature. He did not, however, succeed in his attempt, for, notwithstanding his high connexions, and that some of the great officers of the realm were prelates, the judges continued, according to law, to keep the ecclesiastical courts within their limits, and when Boniface made application to parliament, he obtained no redress. His canons were not confirmed in that reign, and, in the reign of Edward I. an act of parliament passed, entitled *Prohibitio formata de Statuto Articuli Cleri*, which was expressly directed against different points in these canons. After this the clergy exhibited, in the same reign, certain articles entitled *Articuli contra Prohibitionem Regis*, not with the view of upholding the rejected canons, but in order to obtain an explanation of some points that affected their just rights. An answer was returned to these articles; and that the matter might be thoroughly adjusted, Walter Reynolds, archbishop of Canterbury, who was in great esteem with Edward, drew up sixteen articles, to which answers were given seriatim to every one of them, by authority of parliament, and in such manner that the question between the temporal and ecclesiastical courts was, as it were, compromised by mutual concessions, and put on a footing that has lasted ever since, with very few alterations.

By the statute of Sheriffs, passed in the same year, an

Edw. II.

Stat. 2 Ed. II.

Articuli Cleri.

Stat. 9 Ed. II.

Co. 2 Inst. 00.

Statute of Sheriffs. St. 2. 9 Ed. II.

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alteration was made in the choice of these officers, which was taken from the people at large, and committed to the chancellor, treasurer, barons of the exchequer, and justices. None were to be appointed who had not sufficient land to answer to the king and his people. This alteration was called for by the former malpractices of these officers, and naturally tended to elevate the character of those who afterwards filled this important office.

Statute of Gavelet. 10 Ed. II.

In the 10th year of this king, we find the statute of Gavelet, which, as the name imports, had regard to the tenure of gavelkind. Gavelet *gaveletum*, was a leasing, or letting to rent; and the *consuetudo de gaveletum*, signified a process for the recovery of a rent or service, whereby the lord might seize the land in the nature of a distress, to be returned to the tenant in case he paid the rent. This custom, which was less rigorous than the feudal law of forfeiture, had hitherto been confined to Kent, where lands were held in gavelkind, but by this statute was extended to the city of London.

Statute of York. St. 12 Ed. II.

Two statutes were passed in the 12th year of this king, namely, the statute of York, and the statute of Essoins. The former of these contained many provisions relating to the administration of justice, particularly in taking of inquests, the regular return of writs, and the conduct of sheriffs, &c. The statute of essoins regulated this matter, in affirmance of the common law.

Statute of Essoins. St. 2. 12 Ed. II.

Stat. de Vicecomit. 14 Ed. II.

The *Statutum de Vicecomitibus et aliis de viridi Cera*, passed in the 14th year, contrived a shorter process in the Exchequer, for compelling sheriffs to make acquittances to the king's debtors. The statute of Carlisle, *De Finibus*, which, in the form of a writ, was directed in the fifteenth year to the justices of the Bench, for their government, in taking fines, and was confirmatory of the statute *Modus levandi Fines*, 18 Ed. I.

Statute of Carlisle. 15 Ed. II.

Statut. de Prærog. Reg. 17 Ed. II.

Of the three statutes passed in the 17th year of this king, that entitled *Prærogativa Regis*, is the most important. Prærogativa, from *præ*, before or first, and *rogo*, to ask, was

applied by the Romans to such tribes as were first asked, that is, their votes taken in the choice of consuls, whence it came to signify generally pre-eminence or superior authority. Its use, in application to kingly power, which, in the eye of the common law, admitted of no comparison with any other, appears to have commenced about this period, when a power was rising in the state, to control the king in the exercise of that authority, that he had heretofore employed at his own discretion in the government of the state. The object, therefore, of this statute was to define those rights, which had been enjoyed by the crown from time immemorial. These were partly of a feudal and partly of a political or general nature.

Wardship. Stat. Prærog. Reg. 17 Ed. II. st. 1. c. 1. Glanv. l. 7. c. 10.

The statute declares, in the first place, that the king has the wardship of his tenants *in capite*, which was agreeable to the feudal law, as established in the reign of Henry II. "Notandum," says Glanville, "quod si quis in capite de domino rege tenere debet, tunc ejus custodia ad dominum Regem plene pertinet, sive alios dominos habere debeat ipse hæres, sive non, quia dominus Rex nullum habere potest parem, multo minus superiorem." This is confirmed by Bracton and Britton. But the fees of the archbishop of Canterbury, the bishop of Durham, and some others, where the king's writ did not run, were exempted from wardship.

Bract. 87. Brit. l. 3. c. 2. Stanf. Prerog. 5.

Marriage. Stat. Prærog. c. 2. Ante, p. 74.

The king was likewise to have the marriage of the heir within age, and in his ward, of such as held of him *in capite*, of which mention has already been made in the reign of Henry II.

Primer seisin. Stat. Prærog. c. 3. Stat. Marl. 52 Hen. III. c. 16. Brit. fol. 17. Stanf. Prer. 11. 12.

Primer seisin, *prima seisina*, was another feudal prerogative enjoyed by the crown at common law, as declared by the statute of Marlebridge, and confirmed by this statute. This corresponded to the relief given in the case of subjects, and consisted of the issues of the lands and tenements, which were to be received by the king until livery was sued.

Dower. Stat. Prærog. c. 4.

Dower was to be assigned to the widows of the king's tenants, who were not to marry without his licence. This

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was in confirmation of the common law, as laid down in the charter of Henry I. and Magna Charta.

Parceners. Stat. Prærog. c. 5. Stat. Hiber. 14 Hen. III. Ante, p. 84.

When lands held of the king descended to several parceners, they were all to do homage to him severally, according to the *Statutum Hiberniæ*, in the reign of Hen. III. In the case of common persons, we are informed by Glanville and subsequent writers, that the eldest did homage for herself and her sisters.

Wardship of married women. Stat. Prærog. c. 6. Stanf. Prer. 26.

If any woman, during the life of her ancestor, tenant *in capite*, was married within the age of consent, the king was to have ward of the body of the woman, until she was of age, when she might have her election to continue with him to whom she was married, or accept a husband whom the king should propose. That this was also a part of the common law, has been shown from records of those times.

Alienation without licence. Mag. Chart. c. 32. Stat. 18 Ed I. Stanf. Prer. 27. Stat. Prærog. c. 7.

We have seen what restraints were imposed on alienation by Magna Charta, and subsequently by the statute of *Quia Emptores*; but it is generally admitted that these provisions related solely to common persons, and that tenants *in capite* were never allowed to alien. For the determination of this point, therefore, the statute declared, in confirmation of Magna Charta, that none who held of the king *in capite*, by knight's service, might alien more of his land than that the residue should be sufficient to answer the service, unless he had the king's licence for so doing. As to the alienation of sergeanties without the king's licence, the statute further declared, that the king was used to rate such sergeanties at a reasonable extent to be made of them.

Advowsons. Stanf. Prer. 32.

In regard to advowsons, when another presented to a church of which the advowson belonged to the king, and the king recovered in a suit, no lapse should hold against him, though he did not present until after six months from the voidance. Of this prerogative, there is no mention either in Glanville or Britton; but it is supposed to be grounded on the well-known maxim in law, *quod nullum tempus occurrit regi.*

The political or general rights declared by this statute,

were the custody of idiots and lunatics, wreck, royal fish, and the goods and chattels of felons.

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Idiots.

Bract. 421.

As to idiots, it appears from Bracton, that where the plaintiff in a suit was found to be *fatuus à nativitate*, that is, a natural fool, and also one who could neither speak nor hear, it was the office of the judge to provide a tutor for his person, and, as it should seem, to appoint a curator for his estate. Probably this trust was given to the lords, of whom the lands were holden; but being liable to abuse, we learn from subsequent writers, as also from this statute, that the king should have the custody *fatuorum naturalium*, taking the profits of their lands, without waste or destruction, with a reservation, at the same time, to the lord, of all his lawful claims for wardship, relief, and the like. By virtue of this statute, it appears, that when the king was informed that such a one was an idiot, he caused him to be brought before the chancellor, or some other whom he appointed, that he might be examined; and thereupon a writ was issued, called the writ *de idiota inquirendo*, to inquire whether he was an idiot or no; and if he was found to be *purus idiota à nativitate*, then the king had the custody of his person and his lands during his life, but after his death he restored the lands to his heir.

Reeves' His. ii. 307.
Britt. 167.
Flet. l. 1. c 6. 10.
Stat. Prærog c. 9.

Stanf. Prer. 34.

F.N.B. 202.

A similar provision was made for the protection of lunatics, or any one that should become *non compos mentis*, with lucid intervals. They were, according to Bracton, to have a tutor, but by this statute, it was declared to be a part of the king's prerogative, to provide that the lands of such a one should be kept without waste and destruction, his family maintained out of the issues thereof in a competent manner, and the residue kept for his use, when he recovered.

Lunatics.
Stat. Prærog. c. 10.
Bract ubi supra.

Stanf. Prer. 36.

The ancient prerogative of wreck was now confirmed by this statute. Wreck, in the Saxon *wraec*, is like the English rack and break, derived from the Greek ῥηγνυμι, in Latin *frango*, and signifies a vessel tossed on the shore in a broken and shattered condition; but, in a legal sense, the

Wreck.
Stat. Prærog. c. 11.

right to the vessel and the goods therein contained. That all wrecks were the property of the state, was a maxim universally established from the remotest antiquity; and was so rigorously enforced, as to include not only the goods and valuables in the vessel, but also all persons cast alive on shore, who, being taken captive, were obliged to purchase their liberty by paying a ransom. Thus, we are told, that Guy, earl of Pouthien, detained Harold, the competitor for the crown of England, as a prisoner, when he was shipwrecked on his coast, and stripped him of every thing, "pro ritu loci, pro more gentis insito," observes Eadmerus.

Eadm. His. l. 2.

So inveterate was this custom, that notwithstanding the efforts made by several popes to put a stop to the unchristian-like practice, it was not only held to be lawful, because it was sanctioned by immemorial usage, but there were some who thought, that whatever was cast upon their shores, was sent to them by God and their good fortune. But this inhuman principle and practice was not universal. By the edicts of some Roman emperors, the owners of shipwrecked goods, were allowed to recover them against the fiscus or imperial treasury. Among the Saxon kings there are also examples of similar humanity, which is promoted by the laws of Henry I. and II. By the former it was ordained, that if any person escaped alive out of the ship, it should be no wreck. By the charter of the latter, it is declared, that if out of any vessel cast on the shores of England, Poictou, Oleron, or Gascony, either man or beast should be found alive, the goods should remain to the owner if claimed within three months. In Bracton's time the law appears to have been still more enlarged in favour of the owner, for if a dog or a cat only escaped alive, or there was any mark by which the owner of the goods might be discovered, they were to be restored to him, which law was confirmed by the statute of Westm. 1. The time of limitation for making claims, was the ordinary legal time of a year and a day, which prevailed also in Normandy.

Cod 11.5.1.

Lindenbrog. Leg. Antiq. 146 157.

LL. Hen.II. apud Wilk. 305.

Rym. Fœd. i. 36.

1 Comm. 291.

Bract 120.

Stat. West. 1. c. 24.

Grand Cout. c. 17.

Co. 2 Inst. 167.

The statute of Westminster speaks only of wreck, or that

which was cast upon land, but it extended also to things remaining in the sea, which, when they were cast in, were called jetsam, from the French *jetter*, to cast; when they were found floating on the surface, they were called flotsam; and when they were sunk in the sea, with a buoy or cast tied to them, they were called ligam, from the Saxon *lagan*, which was taken in the sense of wreck, or the law of wreck.

Jetsam, Flotsam, and Ligam. Co. 5 Rep. 106. Spelm. Gloss. and Du Cange, Gloss. ad Voc. Lagan.

While the rights of humanity were thus regarded by the abovementioned provisions of the legislature, the revenue of the crown was so far diminished, but when no owner was to be found, and no claim was put in for the goods within the time of limitation, they were declared by the statute we are now treating of to belong to the king by his prerogative, except in certain places privileged by the king.

Royal fish.

Under this head was also brought, what has since been called royal fish, that is, the whale and the sturgeon, which, when they were thrown ashore or caught near the coast, were, from their value and rarity, the property of the crown, as they had been at an early period in Denmark and Normandy.

Grand Cout. de Normand. c. 17.

Stat. Prærog. c. 16.

The chattels of condemned felons and fugitives were, in affirmance of the common law, to go to the king, wherever they were to be found. Besides, the king was also to enjoy the feudal right of the year, day, and waste, of the lands and tenements of such felons, unless the lord paid a reasonable fine, which agrees with the law as laid down by Glanville, but not with Magna Charta, where there is no mention of the waste, nor with Bracton, who seems to signify that a fine might be given for the year and the day, without reckoning the waste.

Ante, p. 76. Mag. Chart. c. 22. Bract. 119. Stanf. Prer. 45.

Besides the abovementioned points of prerogative, there were several others not named in this statute, probably because they were thought so indisputable as not to require any particular notice. Of this description were treasure-trove, waifs and strays, which we read of long before this time.

Treasure-trove.

Treasure-trove, *thesaurus inventus*, from the French *trouver*, to find, was, at one time, a no inconsiderable source

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of the king's revenue. Under treasure trove, was comprehended money or coin, gold, silver, plate, or bullion, which was found hidden in the earth, or any other private place, which Bracton, in the language of the civil law, calls "vetus depositio pecuniæ." If the owner were not known, this belonged to the king, but if he were discovered, he might lay claim to it; and if the thing were found in the sea or upon the earth, it appears that it belonged to the owner. By a law of Edward the Confessor, *thesaurus inventus* belonged to the king, unless it was found in church lands, when the whole of the gold and half the silver belonged to the king, and half to the church.

Bract. 120.

Ll. Edw. Conf. c. 14.

Waifs, strays.

Waifs, *bona waiviata*, from the German *werfen*, to throw, signifies any thing thrown away or abandoned, as when a thief throws any thing from him, that it may not be found on his person. Estrays, in the French *estragere*, and the Latin of the middle ages *extrahura*, from *extra* without, signified literally any thing out of its place; and in a legal sense, such animals as were found wandering and having no owner, as Fleta defines it, "pecus vagans quod nullus petit, sequitur, vel advocat." The king was entitled to waifs, if the party robbed did not seize them first; but in regard to strays, it was necessary that they should, according to the old Gothic usage, be proclaimed in the church, and two market towns next adjoining. The franchise of waifs and strays was sometimes granted by the king.

Flet. l. 1. c. 43. Mir. c. 3. Co. 5 Rep. 109. Stirnh. de Jur. Goth. l. 2. Du Cange, ad Voc.

Besides the abovementioned statutes, which are universally ascribed to this king, there are some others in the statute-book, inserted at the end of this reign, the dates of which are not precisely known, although they are generally admitted to have passed in the reign either of Hen. III. Ed. I. or Ed. II. Among these, is the statute of Ragman, *De Justitiariis assignatis*, on which is supposed to have been grounded the commission by which the justices of Trailbaston exercised their criminal jurisdiction.

Co. 4 Inst. 186.

Decisions of courts

The common law had necessarily undergone some alterations and modifications, not only from the statutes passed in

the two preceding reigns, but also from the decisions of courts, where every point of law was more nicely defined and clearly elucidated than formerly.

Descents.

The law of descents had undergone some alteration or modification since the time of Glanville. The doctrine of primogeniture, which was then established in knight's service, was afterwards extended to other tenures. Bracton lays it down as a general rule in law, that "jus descendit ad primogenitum." It was also then held, as it has been ever since, that all descendants *in infinitum*, from any person who would have been heir, if living, were to inherit *jure representationis*. Thus the eldest son dying in the lifetime of his father, and leaving issue, that issue was to be preferred in inheriting to the grandfather, before any younger brother of the father; which settled the doubt that existed in Glanville's time, respecting the law of succession in this particular.

Bract. 64.

Reeves' His. Engl. Law, i. 310.

Bract. 65. a.

Ante, p. 85.

Exclusion of the half-blood.

Males were preferred to females so strictly, that by a rule of law the right should never come to a woman so long as there was a male, or one descended from a male, whether from the same father or not. An exception was, however, admitted in Bracton's time in favour of the whole blood, to the exclusion of the half blood, in regard to purchased lands; as in the case of a man having a son and daughter by one wife, and after her death marrying another, and having a son and daughter by her. Then the son of the second marriage having made a purchase of land, and dying without children, it was admitted that the sister of the second wife should take the inheritance, to the exclusion of the other brother and sister. Bracton was also of opinion that the same exception ought to apply to inheritances as well as to purchased lands; but although his opinion was supported by that of Fleta and Britton in the last reign, yet it does not appear that this point of law was finally settled until the present reign. It was now held that every one, as he came into seisin, made a *stipes*, by the maxim *seisina facit stipem*; that is, that the seisin of the last possessor was taken as a presumption of his being of the

Bract. 65.

Bract. ubi supra.

Brit. c. 119. Flet. l. 6. c. 1.

Hale's Hist. Com. Law, c. 11.

Reeves' His. ii. 316.

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blood of the first purchaser; and, consequently, that the possession of the brother constituted the sister to be heir. So that if the brother died, and the sister entered, the land was rather to escheat to the lord than descend to another sister of the half-blood. "This," says the book, "is the common law, which ought not to be changed." Conformably to this opinion, it appears that in a case which came before the court in the fifth year of this king, it was decided that the land in question was to go to the uncle, and not to the sister of the half-blood.

Mayn. 148.

Reeves' His. ii. 316. 4 Ed. II. Mayn. 169.

The *Stat. de Donis* was so strictly adhered to in this reign, that the spirit was more regarded than the letter; wherefore it was decided that the heirs of the first donee, though not mentioned in the statute, were restrained as well as the donee himself from alienating the land, and that the word heirs was omitted by the oversight of the clerks.

Reeves' His. Engl. Law, ii. 322.

There was, however, one way left of getting rid of an entail which could not be prevented, namely, by means of warranty; for it appears to have been admitted that warranty with assets, that is to say, sufficient land by descent to answer the warranty, should bar the issue in tail. Thus, in answer to the plea *ne dona pas*, in a writ of *formedon in descender*, the tenant might plead that an ancestor of the demandant aliened with warranty to such and such a person from whom the land descended to the tenant, to which the demandant might plead in reply, admitting the deed of his ancestor, that as assets did not come to him by descent from his ancestor, he ought not to be bound by the warranty; and if, upon trial of this issue, it was found that the heir had any value by descent from his ancestor, the warranty was held to be a bar to the action, otherwise not.

Mayn. 45. et seq.

This was conformable to the old law; and, as the *Stat. de Donis* had only declared that a fine should not be a bar, it was decided that the effects of warranty should remain as they had been, with this distinction only, that heretofore the heir of the warrantor was barred from claiming the estate, although he had no assets or lands by descent; but now a

warranty was held to be no bar, unless accompanied with assets.

Among the writs of *contra formam feoffamenti* grounded upon the statute of Marlebridge, chap. ix. was one not mentioned before this reign, called a *monstravit*, and in after-times more frequently *monstraverunt*. This writ, also, lay at common law for tenants in ancient demesne, who had been burdened with more services than were originally in the tenure. Questions of this sort were generally determined by application to domesday-book in the Exchequer.

New writs grounded on the statutes. Reeves' His. ii. 326. Mayn. 280, &c.

There are several other actions, now mentioned for the first time, which were grounded on the statutes of the two preceding reigns: as the writ *de contributione*, on the stat. of Marlebridge, to compel coparceners to aid the eldest sister in performing the services; also the writ of office called *diem clausit extremum*, grounded on the same statute, chap. xvi. for taking into the king's hands the lands of one who died seised *in capite*; a writ of entry for the reversioner, founded on the stat. Westm. 2, c. 3; a writ *contra formam collationis*, on stat. Westm. 2, c. 41; and the writ *in casu proviso*, grounded on the stat. of Gloucester, chap. vii.

Mayn. 67. 91, &c.

Others were grounded on the common law; as the writ of *secta ad molendinum*, for recovering suit to a will; and a writ of *quid juris clamat*, for a cognusee in a fine levied by a reversioner to procure the attornment of the tenant for life; also a writ of Deceit, which was brought against a person for levying a false fine, and suggesting a false title, for suing a *monstravit*, where the plaintiff was tenant in ancient demesne, and other deceitful proceedings in judicial matters.

Writs at common law. Reeves' His. ii. 327.

An action of debt, which, in the reign of Henry II. lay for the recovery of money or chattels, had now acquired sufficient importance to be nicely considered in the courts. In the preceding reign it was split into two, namely, a writ of *debet* for the recovery of money, and a writ of *detinet* for the recovery of chattels, which distinction was now regularly observed. A writ of *debet* was usually grounded on a

Action of debt.

Flet. 133. Mayn. 589.

Reeves' His. ii. 330.

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deed or obligation to pay money, which, for the most part, was a writing sealed; but sometimes, according to the ancient usage, it was grounded upon a mere bargain of buying and selling. In the first case, the plaintiff would state his demand, and produce a deed testifying the transaction. The common plea to a deed, was *nient le fait*, that is, that it was not the defendant's deed; sometimes *deins age*, that is, not of age when the deed was made. A plea was held to be good to say that it was made at Berwick, because the place was out of the jurisdiction of the court. The same objection held good against a deed made at Chester and Durham. If the transaction passed without writing, then the plaintiff, after stating his demand, would offer to produce his *secta*, according to the old usage.

Mayn. 24.

Reeves' His. ii. 332.

Actions of detinue, were most usually brought for deeds and charters, which, where a feoffment of lands was made, were frequently deposited in the hands of a third person; and sometimes were demanded in an action of detainer, whereby the merits of the detainer were brought under discussion. By an action of detinue, were also tried the merits of the question respecting the *rationabilis pars*, but the decisions of the courts were invariably against such claim. A writ was brought by an infant against his father's executors, reciting that *per consuetudinem regni*, the mother was to have a third, and the executors a third, &c. To this the defendants pleaded *pleinement administre*, upon which one of the justices expressed a doubt, whether an action would lie, because the writ was grounded on a particular custom, but we, says he, know of no such custom, and the law is otherwise. Another of the judges observed, that he had often seen such writs, but never knew one of them maintained. The clause in Magna Charta, " salvis rationabilibus partibus," which was urged in such cases in support of the plaintiff's claim, was held by the court to refer only to particular customs, and that neither the great charter, nor the common law, restrained the father's power of disposing of his own effects.

Mayn. 536.

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Action of covenant. Magn. 603. Reeves' His. ii. 336.

The writ *de conventione*, or an action of covenant, which is mentioned by Bracton, lay sometimes for the recovery of moveables and of immovables, for the most part for land, or for some profit, or casually issuing out of land, as for not doing homage, and services, and the like. A writ of Annuity was most frequent between ecclesiastics, in which cases it was no uncommon plea to allege, that it was a matter of a spiritual nature, but this plea was always overruled.

Action of trespass.

Trespass, in Latin *transgressio*, signified literally the unlawful passing of any bounds, whence it came to be used in the sense of any injury done with force, either to the person or the property of another. In the reign of Henry III. actions of trespass appear to have been but little in use; civil injuries being, for the most part, determinable by the assize, and personal injuries prosecuted as criminal offences, by appeal or indictment. Trespasses are reckoned by Bracton among the *placita coronæ*, particularly in cases of unlawfully distraining; and he held that the writ *quare vi et armis* a man entered land, was bad, because it brought the mode of the trespass into question, rather than the trespass itself, although there were, in his time, trespasses respecting land, which were determined by the assize, or more frequently by the jurata; as, if any one made use of another's land against the will of the owner, or appropriated any thing to himself which was common. In the next reign, actions of trespass became very frequent, in cases where the assize had been heretofore resorted to; as, for breaking and entering houses and lands, beating down a mound, cutting trees, and the like; in which cases it was held to be a good plea, if the defendant said it was his own freehold, so that titles to land might in this manner be tried. The action of trespass was likewise employed as a remedy for many personal injuries, as battery, imprisonment, carrying away goods and chattels, and the like cases of violence, which had before been treated criminally.

Bract. fol. 155.

Ibid. c 413.

Ibid. 218.

Mayn. 458.

Ibid. 12. 63. 135. 198. et passim.

We are now arrived at a period when pleading was becoming a matter of science, which, while men prosecuted

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Pleading in person.

Stephen on Pleading, App. No. 5.

their own suits, was conducted probably with but little regard to form or precision. Glanville is almost entirely silent on the subject, and from the manner in which he sets forth the declaration, there is no doubt but that the parties appeared in court, and pleaded their own cause in person. That the same was the case in the time of Bracton, may be inferred from his words, for he expressly says, "comparentibus tam petente quam tenente." Nevertheless, he treats rather largely on the allegations or pleas that the tenant might bring forward in his own defence, and states the order in which these allegations ought to be brought: namely, first to the jurisdiction of the court; secondly, to the person, first to that of the plaintiff, then to that of the defendant; thirdly, to the court or declaration; fourthly, to the writ; and fifthly, to the action. This is agreeable to what is stated by other writers, and to the law at this day.

Bract. 400.

Britt. 41. Flet. l. 6. c. 45. Co. Inst. 303. a.

Pleas.

Bracton gives the name of *exceptio* to the allegation brought by the defendant, a term derived from the civil law, which continued to be in use for some time after he wrote. Plea, in the modern sense, of what either party alleged for himself, in a cause depending for trial, was not as yet introduced. Bracton, in the language of the civil or canon law, divides pleas into peremptory and dilatory, a distinction which has been handed down to the present day. A plea in abatement, is termed by this writer *exceptio ad breve prosternandum*, and by Britton *exception pur brefe abatre*, whence the modern terms of abate and abatement. The *exceptio peremptoria* of Bracton is called by Britton *exception pur barrer le plaintiffe de sa demande*, that is, in modern language, a plea in bar.

Bract. 399. Steph. on Plead. App. No. 22, 23.

Steph. on Plead. App. No. 25.

Bract. 400.

The plaintiff's answer to the defendant's plea, is called by Bracton *replicatio*, replication: the allegation of the defendant in reply is called *triplicatio*, in after times, rejoinder. This was followed by the *quadruplicatio* and *quintuplicatio*, which were afterwards called the rebutter and the surrebutter.

Co. Inst. 303. a.

Declaration. Ante, p. 113.

The declaration, is called by Glanville *petitio*, that is, a

claim; which term, as Mr. Reeves observes, was borrowed from the civil law: by Bracton it is called *intentio*, a term borrowed from the canon law. At the period we are now treating of, it was denominated in Latin *narratio*, and in the French *conte*, count.

Reeves' His. i. 427.

Issue. 372. a.

The process of coming to an issue is called by Bracton after the civilians *litis contestatio*. The term issue, in Latin *exitus*, is first to be met with in the year-books of this king. It was so called when the pleaders, by their alternate allegations, arrived at some specific point, where the matter was affirmed by the one and denied by the other party, when they were said to be *ad exitum*, at issue; that is, at the end of their pleading. If the point thus arrived at was a matter of law, an *issu en ley*, as it is termed in the year-books of this king, it was of course decided by the judges, to whom all questions of law belonged; but if a matter of fact, an *issu en fet*, it was referred to the jury.

Steph. on Plead. App. No. 9.

Commencements and conclusions.

Some of the formal commencements and conclusions of pleadings now in use, may be traced to an early period; thus in Britton we find this form of commencement: *Le plaintiffe ne purra rien conquere*, which answers to the *actio*, or a modern plea in bar, which has this commencement: "Says that the said A. B. ought not to have or maintain his aforesaid action against him the said C. D. because he says, &c.;" so, likewise, *l'escript, ne luy doit grever*, answers to the commencement in an action of debt on bond, commonly called an *onerari non*, which runs thus: "Says that he ought not to be charged with the said debt, by virtue of the said supposed writing obligatory."

Ibid. No. 71. Britt. c. 98.

Bract. 57.

Prayer of judgment, at the conclusion of pleading, occurs in Bracton, *et inde petit judicium*. The form of commencing the declaration, *ceo vous monstre*, occurs in the year-books of this king; and we find it Latinized in Bracton, *hoc ostendit vobis*, but Glanville commences his declaration with *Peto*, &c.

Ante, p. 113.

Bract. 34. b. et passim.

Bracton makes frequent mention of producing deeds in

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court, under the phrase *profert chartam*, whence the phrase in after times, to make profert of a deed, so as the demand of *oyer*, came to signify the demand to hear the deed read.

Days of appearance.

Day, *dies*, in the legal understanding of the day of appearance, or the continuance of a suit when a day is given, was in use long before this reign, for we read in Bracton of the *dies datus partibus*, and also in the statute of the *dies communes in banco*, in real actions. In a similar sense, days were distinguished into *dies juridici*, and *dies non juridici*. The *dies juridici*, called by Britton *temps convenables*, were only in term time, except in assizes; but there were also *dies non juridici*, or, in modern phraseology, *dies non*, in term, as Sundays, and some feasts.

Co. Inst. 134. l. Britt. c. 53.

The stated days of appearance in each term were called returns, because writs were made returnable on those days. The first return day of the term was called the essoin day, because the court sat to take essoins. The next day was called the day of exception, because, if the defendant did not appear or cast an essoin, that is, send an excuse, the plaintiff the next day might enter an exception, and obtain an order that his essoin should not be received. The third day was called *retorna brevium*, because the sheriff on that day returned his writs into court. The fourth day was the appearance day, or *dies amoris*, because it was given *ex gratia curiæ*, for the defendant's appearance. It has since been more commonly called *quarto die post*, because no default was recorded until the fourth day was past, unless in a writ of right, where the law allowed none but the day of return. The practice of allowing the defendant three days before his appearance, after the return of the writ, is derived from the practice of the ancient Germans: "Illud ex libertate vitium, quod non simul nec jussi conveniunt; sed et alter et tertius dies cunctatione coëuntium absumitur;" looking upon it, as it should seem, a mark of servitude to attend at a peremptory command.

Tidd's Prac. 122.

Co. Inst. 135. a.

Tac. Ger. c. 11. Spelm. Orig. of Terms, c. 7.

Demurrer.

Steph. on Plead. App. No. 17.

A demurrer is one kind of plea mentioned by that name in this day. Demurrer, from *demorari*, to abide, signifies

that which causes one to abide or pause. Pleaders used frequently, as we learn from the year-books of this and following reigns, to put themselves upon the judgment of the court, upon a matter of law, in this form: "Nous demurrions en vos discretions si nous etions mest a respond' a ceste imprisonement desicome il ne dit pas qil fuist imprisone en notre garde et a notre suvite."

Imparlance. 17 Ed. II. Mayn. 514. Blount's Dict. Britt c. 109.

If a party found himself unprepared to answer the last pleading of his adversary immediately, it became usual to grant, at his request, what was afterwards called an *emparlance* or imparlance, *interlocutio* or interloquela, which signifies properly a speaking or conferring on a matter, and in this sense is used by Britton for the conference of a jury; but it is here taken to denote the liberty or indulgence to pause and deliberate what is best to do. Mr. Justice Blackstone supposes the term to have been thus applied, from the idea that the parties might confer together and compromise the matter. An imparlance was a species of continuance or adjournment of a suit.

3 Com. 301.

Rules of pleading.

As to the rules by which the course of good pleading was regulated in aftertimes, we find but little mention in the writers of this period. Glanville makes some few observations on the writ, implying that an error in the name, or a variance between the writ and the declaration, might cause the writ to abate; but he intimates, that the party might have another writ. Bracton is very explicit on the subject of both the writ and declaration. In regard to the latter, he lays down a rule which has since been established, that a declaration ought to contain two things, namely, certainty and verity. Duplicity in pleading, that is, pleading many distinct matters to one and the same thing, is partially condemned by Bracton, and still more expressly so by Fleta; nevertheless it appears to have been sanctioned by the practice of the courts until this reign, when it was objected to by the court; "vous dites chose que voet avoir deux issues-tenez vous al une:"

Bract. 140. Co. Inst. 303. a.

Bract. 400. Flet. l. 6. c. 35. Steph. on Plead. App. No. 57. Mayn. 14. Ed. II.

With what nicety the writ was discussed, may be gathered

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Specimen of pleading.

Reeves' His. Engl. Law, ii. 344.

from the following specimen of pleading from the year-book of this king, according to the version of Mr. Reeves. As the names of the judges and counsel are abbreviated, if consisting of more than one syllable, they are now not always to be found out by that means. For *Brab.* or *Malm.* in the following specimen of pleading, there is nothing to correspond in the *Chronica Juridicialia*. *Pass.* stands probably for Serjeant Passelegh.

"The prior of Lenton brought a writ of trespass, grounded upon the statute of Marlebridge, c. 28, against the parson of Bangor, 'quare vi et armis bona et catalla domus et ecclesiæ ipsius prioratus ad valenciam, &c. ad grave damnum, &c. et contra pacem nostram, &c.' upon which he counted that he took some wool and lambs. Upon this, *Herle*, one of the counsel for the defendant, demanded judgment of the writ, for there was no one form of a count for live and dead chattels; and, if he had wanted to count of lambs taken and carried away, he might have said in his writ, 'quare averia sua cepit et abduxit.' To this, *Brab.*, one of the judges, says, he has counted of wool and lambs which can be as well carried as chased, therefore *respondeas ouster*, (that is to say, answer over or put in another plea.) Then *Herle*, taking another ground, said, again we demand judgment, because, he says, 'bona et catalla domus et ecclesiæ,' &c. whereas, by right, the property of the chattel is not in the church, but in the prior, therefore judgment. To this *Malm.* for the plaintiff, said, our writ is given by statute, and we have followed the statute, which was assented to, and so another *respondeas ouster* was awarded."

"Then *Pass.* another counsel for the defendant, said, Again we demand judgment of the form of the writ, for the statute says that a man should have recovery, *ad bona repetenda*, and therefore the prior ought more naturally to have a *præcipe quod reddat* or detinue of chattels, or replevin, and not this writ, which goes wholly for damages. 'What then,' says Malm. 'if the chattels were dead or aliened, should I have no recovery?' and there was another *respondeas ouster*."

"Again, says *Herle*, this writ is given by statute to successors after the death of their predecessors, against whom every action for recovery of any thing ought to be brought; and we say that the prior *William*, in whose time, &c. is still alive, therefore we demand judgment. *Malm*. says, he is dead as to this action; for he is deposed, and so the action, as against him, is extinct; and if I was to bring an assize, 'quis advocatus, &c. ultimam personam, &c. quæ mortua est, &c.' though the person in question was alive, and at the bar of the court; yet, if he was no longer parson, the writ would be good, and continues he, put a case, that a husband aliened land, of the right of his wife, and then was outlawed, and his wife brought a *cui in vita*, though the husband was actually alive, yet being dead in law, the writ would not abate. Then *Roub*. one of the justices, said, 'If an abbot brought a writ against an abbot, and the defendant was deposed pending the plea, the writ would not abate; but it is otherwise where such an abbot was plaintiff, for then all cause of action ceased;' and there was another judgment of *respondeas ouster*.

"Again *Pass*. demanded judgment of the writ, because it was a writ of trespass *vi et armis*, for a wrong done to divers persons, and the statute does not give a recovery of damages, but only *ad bona repetenda*. But *Malm*. argued the writ was good as it now stood, for two reasons; first, because the trespass was done in the time of our predecessor, for which trespass we are entitled to our action by the statute; secondly, because of the detinue in our time. *Herle*, Your writ has nothing to do with detinue of chattels, but is of a fact done with force and arms to another person, so that the king would be entitled to a fine for a trespass done in the time of his predecessor. *Malm*. (repeating what he had before urged) Suppose the chattels were dead or eloigned, I could not recover the things themselves, and then my action must be in damages, or I should have no recovery at all. *Herle*, Yes, you might recover the value, &c. Then *West*, one of the judges, interposing, said, the force of their objection is,

that a man shall not recover damages for a trespass done to another, and yet executors may recover damages for a trespass done to another. Again, if waste is done in the time of my father, I shall have an action for the waste and trespass, &c. In regard to the first of these cases, it was observed, that the executors recovered not in their own right, but in right of another; and as to the second, about waste, that it was by statute, and not by the common law. However, Rouberic, another justice, said, they were all agreed that the writ was good, and therefore awarded another *respondeas ouster;* upon which the defendant pleaded the general issue, that they did nothing against the peace, prest, &c. *et alii è contra* and so issue was joined.

The sources of legal information were now considerably increased. Besides the statutes, we have the records and the year-books.

Vetera statuta.

Reeves' His. ii. 354.

The statutes, commencing with Magna Charta, and ending with those of Edward II. including such as are of uncertain date, have been distinguished by the title of the *vetera statuta*, and sometimes from the circumstance of their collection and publication, have been further distinguished into the *prima et secunda pars veterum statutorum.* Hitherto they had been mostly named from the place where the parliament was held, or the statute passed, as the statutes of Merton and Marlebridge, the statutes of Westminster, first, second, and third; statutes of Gloucester, Winchester, Carlisle, Lincoln, and Acton Burnel, &c. Others were denominated from the subject matter of them, as the statutes of Ireland and Wales, the statutes of Essoins, of Vouchers, of Sheriffs, *Confirmationes Chartarum, Prærogativa Regis, de Militibus*, &c.; others were distinguished by the initial words, as *Quia Emptores, Circumspecte agatis;* lastly, some few in this, and the preceding reigns, are distinguished by the year of the king's reign in which they were passed, as the 10 Ed. II. which is the usual mode of citing statutes that has since obtained.

Records.

As to the records, it is a remarkable circumstance, that

notwithstanding the inability of this prince, and the troubles of the times, he was the first to make provision for their better custody. In the 14th year of his reign, he, by writ of privy seal directed to the treasurer, barons, and chamberlains, of the Exchequer, commanded them forthwith to employ proper persons to superintend, methodise, and digest, all the rolls, books, and other writings, of the times of his progenitors, kings of England, then remaining in the treasuries of his Exchequer, and in the Tower of London; all which, as it is there stated, were not disposed, in such manner as they ought to be, for his and the public good.

Ayloffe's Anc. Chart. Introd. 25.

In his 16th year, he gave similar directions respecting the bulls, charters, and other muniments, touching his state and liberties within England, Ireland, Wales, Scotland, and Ponthieu; and a few months after he appointed Robert de Hoton, and Thomas de Sibthorp, to examine and methodise all such charters, writings, and other national muniments, as, at that time, were deposited in the castles of Pontefract, Tuttebury, and Tunbridge, also such as had been newly brought into the Tower of London, and all those which were kept in the house of the Black-Friars preachers.

Rolls of Chancery.

As the rolls and records of the court of Chancery, which were now kept separate, had greatly multiplied, a particular officer was appointed for the safe keeping of them, who has since been known by the name of the Master of the Rolls, but was, at different times, styled *Gardein de Rolls*, *Clericus et custos Rotulorum*, *Clericus parvæ Bagæ*, *et Custos Rotulorum, et Domus conversorum*. William de Armyn was, with the consent of the chancellor, John de Sandale, first chosen to this office in the twentieth year of this king.

Master of the Rolls.

Ayloffe's Anc. Chart. ubi supra.

Year-books.

To Edward II. we are also indebted for the commencement of the judicial reports, which have since acquired so much importance in the study of the law. We have, from the beginning of this king's reign, year-books, or books of the years and terms, containing the reports of adjudged cases, which were so called, because they were published annually, from the notes of certain persons, who were paid

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Bridgeman's Leg. Bibl.

a stipend by the crown for this employment. By comparing these reports, as given in Maynard's year-books, *temp.* Ed. II. with those of modern times, it will appear, that although they were much more concise, yet they are often much more pointed and argumentative, than those of the present day.

These reports were printed at various times by Machlinia, Pynson, Redman, Berthelet, and others; nevertheless, they were at one time in such request, that one set sold for near 40*l.* They have since been printed with the year-books of the subsequent reigns, so as to form a collection in eleven parts in French.

Mirror.

The only law treatise referred to in this reign, is well known by the name of the *Mirror des Justices*, the reputed author of which was Andrew Horne, but the share which this writer had in the work, has been a matter of dispute;

Co. Pref. to 9 & 10 Rep. Dugd. Orig. Jur. 23.

Lord Coke supposes that the greater part of it was written before the Conquest, and that Horne added many things to it in the reign of Edward I. Dugdale supposes that Horne composed the Mirror of Justices from an old law-tract, called *Speculum Justitiariorum.* As a work did really exist under this title before his time, it seems most probable that it was incorporated by Horne into his own work, with such additions and alterations as he might think proper to make.

Gough's Brit. Top. i. 576.

Andrew Horne appears to have been a native of Gloucester, and is said to have compiled a *Chronicon Glocestriæ*, long since lost. He was chamberlain of London, *temp.* Ed. II., and compiled a work in the town clerk's office, entitled, *Liber Horne*, which contains the charters, customs, ordinances, and statutes, relating to the city, *temp.* Hen. III. and Ed. I.

9, 10 Rep. ubi supra. Hicks' Diss. Epist. 42.

As to the merit of this work, there is some diversity of opinion. Lord Coke says, that in the Mirror you may perfectly and truly discern the whole body of the common law of England; but Dr. Hickes, in his preliminary dissertation to his Thesaurus, treats the author as an impostor. Cer-

tain it is, that what he says on the state of the law prior to the Conquest, ought not to be admitted without great qualifications, as the author evidently writes with very little precision, and asserts some things for which he does not appear to have had authority; but in what relates to his own times, there is nothing in the work that can militate against his accuracy or authenticity.

The Mirror was first published in 1642, from an ancient copy belonging to Francis Tate, Esq. examined and collated with an old copy in Bennet College, Cambridge. In 1768 it was translated into English, by William Hughes, to which is added, The Diversity of Courts and their Jurisdiction.

Bridgeman's Leg. Bibl.

Inns of court.

We have seen that, in the preceding reign, the king had turned his thoughts to the supplying the courts with practitioners in the law duly qualified: whether any steps were then taken to forward the regular study of the law is not known, as we read of no inns of court before this time, when they were called *hospitia* or *hostels*, because the inhabitants of these inns were attached to the king's courts.

Before the reign of Stephen, the study of the law, like that of most of the arts, was confined to the monasteries, but Mr. Selden adds, that it was also taught in *academiis et collegiis*, by which he has been understood to signify that it was taught in our universities; but the more general opinion is, that our municipal laws did not then form a part of the education at our universities. At a subsequent period they were taught in London by men learned in the law, who set up schools for this purpose. These were abolished in the reign of Henry III., which, probably, paved the way for the more regular institutions, which acquired the name of Inns of Court.

Seld. ad. Flet. c. 7. s. 7.
Wynne's Eunom. Dial. ii.

Co. 2 Inst. Proem.

One of these *hostels*, called Johnson's Inn, or *hostel*, is said to have been at Dowgate; another at Fewter's or Fetter's lane; and another in Paternoster-row. It is possible that there was one in the neighbourhood of St. Paul's church, if we may judge from the custom which is mentioned of the sergeants and apprentices, each sitting at his pillar hearing

Dugd. Orig. Jur. 142.
Hearne's Cur. Disc. 109.
Reeves' His. ii.

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his client's causes, and taking notes thereof on his knee. A vestige of this custom remained even to the time of Charles I. when, upon the making of sergeants, they used to go in their formalities to choose their pillar.

Lincoln's Inn is said to have had its name and beginning from William, earl of Lincoln, who, being well affected to the study of the law, gave the professors thereof a house for their residence, which they held under the bishops of Chichester until the 28th year of Henry VIII., when the bishops of Chichester granted the inheritance to Francis Sulyard and his brother Eustace, both students, the survivor of whom, in the 20th year of queen Elizabeth, sold the fee to the benchers for 520*l.* To this account of the inns of court at this period, it must be added, that Thavies' Inn was, in all probability, inhabited by lawyers.

Pref. 10 Rep. Dugd. 141.

Increase in the number of judges.

Dugd. Orig. Jur. 39.

As the business in the Common Bench or Common Pleas was now greatly increased, Edward found it necessary to increase the number of justices to six, and afterwards to seven.

CHAPTER XVI.

EDWARD III.

King's Councils.—Privy Council.—Magnum Concilium Regis.—National Councils.—Names of the National Councils.—Parliament.—Constitution of Parliament.—Peers of Parliament.—Earls.—Barons.—Dukes.—Knights of the Shire.—Burgesses.—Writs of Summons for electing Knights and Burgesses.—Attendance in Parliament.—Mode of Electing Knights and Burgesses.—Frequency of Parliaments.—Manner of assembling Parliaments.—Sessions of Parliament.—Speaker.—Opening of Parliament.—Humble Address of the Speaker.—Modesty and Humility of the Commons.

As we are now arrived at a period, when English jurisprudence was fast approaching to the form which it has since assumed, it is most convenient to take a general review of some things, which, in order not to destroy the thread of the narrative too much, have not hitherto been touched upon. The first of these points is, what regards the constitution, which, by the use of parliamentary power, and the alterations in the jurisdiction of courts, and other circumstances, had undergone some changes.

King's councils.

The king had, at this period, different councils, by whose advice and assistance he governed the realm. The first was that which consisted of his own immediate counsellors, as the treasurer, chancellor, justices, barons, and such other persons, learned in the laws and judicial matters, as he thought proper to call to himself. This was called the *Magnum privatum Concilium Regis*, also *Concilium Regis privatum*, *Concilium continuum*, and *Concilium secretum Regis*, and in aftertimes, the Council Board and

Co. Inst. 110.

Privy council.

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the Privy Council. With these counsellors the king sat at pleasure; their number was also at the king's pleasure, but at this time they were about twelve.

Magnum concilium regis.

Dugd. Summons to Parl. p. 139. et seq. Co. Inst. ubi supra.

There was also another council, called the *Magnum Concilium Regis*, which appears to have consisted of the peers of the realm, or as many of the barons as the king thought proper to consult occasionally, of which there are several examples in the course of this reign. To this might be added a third council, who were sworn to give advice to the king, namely, his judges and law officers, whom he consulted in all judicial matters. These councils of the king used to sit in different chambers that were about the palace, sometimes *en la chambre blanche*, or *en chambre de peincte*, and sometimes, as is said, *en la chambre des etoiles*, or the star chamber, as this council was afterwards called; whence we learn, from the parliament rolls, that the returns of some writs in this reign were said to be either *coram nobis*, or *coram nobis in camera*, or *coram nobis in cancellaria*.

Co. 4 Inst. 60. Reeves' His. ii. 415.

National councils.

The fourth kind of councils were the national councils, which being essentially different from all the rest, are entitled to particular notice.

De Mor. Germ. c. 11.

National councils are of such remote antiquity, that we find them existing among the ancient Germans: "De minoribus rebus," says Tacitus, "principes consultant, de majoribus omnes;" vestiges of which are, under various modifications and forms, to be met with in the diets of Poland, Germany, and Sweden, and the assembly of the states formerly in France, having been brought into Europe by the northern tribes, who, on the decline of the empire, established themselves in different countries. Among those rude people such assemblies were only irregular meetings, brought together on the exigency of the occasion, to determine, for the most part, questions of peace or war. Their decisions were made by acclamation, and immediately followed by action, &c. As civilization advanced, and questions of civil polity became more numerous and complicated, such assemblies assumed a form and order suited to the temper

1 Comm. 147.

and circumstances of different nations. In our own country they have retained more of their original popular character than in any other.

Names of the national Councils.

The national councils of the Saxons were called, for the most part *synoth*, or *michel-synoth*, the great synod; because they were of a religious character, frequently *michel-gemoth* the great assembly, and frequently the *witenagemoth*, that is, the assembly of the wise men. They were designated, after the conquest, by the Latin names of *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, *communitas regni angliæ*, and *parliamentum*, the name finally adopted, from the French *parler*, to speak, because it was a deliberative assembly. Lord Coke supposes the word to be composed of the words *parler la ment*, to speak one's mind; but Mr. Barrington observes, "Lord Coke's etymology of the word parliament, from speaking one's mind, has been long exploded. If one might presume," he adds, "to substitute another in its room, after so many guesses by others, I should suppose it was a compound of the two Celtic words *parley* and *ment*, or *mend*. Both these are to be found in Bullet's Celtic Dictionary, published at Besançon 1754, 3 vols. fol. He renders *parley*, by the French infinitive *parler*, and *ment*, or *mend* by the words *quantité*, *abondance*. The word parliament, therefore, being resolved into its constituent syllables, may not improperly be said to signify what the Indians of North America call a Great Talk." Mr. Christian is of opinion, "that the termination *ment* has no more signification in it, than it has in impeachment, engagement, imprisonment, hereditament, and a thousand others of the same nature," although, he adds, "the civilians have adopted a similar derivation, that is, testament, *testari mentem*." That the word parliament had no such peculiar meaning attached to it in our language is clear from this, that in its substantival form, it was immediately taken from the French *parlement*, which signified only a court of justice, and not a general council of the realm.

Chron. Chron. Sax. passim. Co. 1 Inst. 110. a. 2 Inst. 156. 4 Inst. 2. 1 Com. 147.

Parliament.

Barring. Obs. Anc. Stat. 48.

Notes to 1 Comm. 147. Taylor's Civ. Law, 70.

Spelm. Gloss. in Voc.

Co. 4 Inst. 12. Prynne on 4 Inst. 2.

The word *parliamentum* was not used in England till the reign of Henry III., although Lord Coke asserts, on the authority of a MS. treatise, entitled "Modus tenendi parliamentum tempore regis Edwardi, filii regis Etheldredi," &c., that the word was in use before the conquest. He set a high value upon this treatise, and assures us, that certain it is, this *modus* was rehearsed and declared before the Conqueror, at the conquest, and by him approved. Mr. Prynne, however, disputes the authenticity of this treatise, from its introduction of the word *parliamentum*, which is universally admitted to have come into use after the conquest.

Constitution of parliament.

The constitution of parliaments has been subject to several changes since their first commencement in England. Among the Saxons the king elected whom he wished to compose his council, sometimes choosing only the prelates, when the matter of deliberation was purely ecclesiastical, sometimes his thanes or nobles, when the matter was of a political nature, and sometimes both, when the matter was of general interest. These were chosen to be his advisers, on account of their dignity, rank, or office; besides which, there is also frequent mention of the *witan*, or wise men, who, from their knowledge and experience, were regularly called to his councils, and were, probably, for the most part, officers of the crown. The people are also occasionally alluded to, as taking a part in these assemblies. They are expressly named in the council held by Ethelwolf, in the year 855, when a tenth was given to the church by the king, *cum baronibus, thanis et populo*, so likewise in the laws of Edward the Confessor, we find them mentioned in this manner. "Hoc enim factum fuit per commune concilium et assensum omnium Episcoporum Principum, Procerum, Comitum et omnium Sapientum Seniorum et populorum totius regni." Dugdale argues, that the Commons had a share in the legislature, from the circumstance that several old and decayed boroughs send members to parliament, though it cannot be shown that those boroughs have been of any reputation since the conquest, much less that they have obtained the privilege by the grant of any succeeding king; on the contrary, those

Pref. to the statutes.

LL. Edw. Conf. c. 8.

Dugd. Orig. Jur.

9 Co. Pref.

of ancient demesne do prescribe, in not sending burgesses to parliament, which prescription proves that there were some boroughs before the conquest. Sir Edward Coke uses the same argument.

On the introduction of the feudal system by the Conqueror, both the obligation and the right of attendance in parliament became clearly defined. All who held lands of the king, *per baroniam*, were called tenants *in capite*, or *barones*, and were bound, by their tenure, to attend the king in parliament.

These *barones*, or lords of parliament, as they were otherwise called, were distinguished into spiritual and temporal. The lords spiritual included archbishops, bishops, abbots, and priors, who held of the king, by barony, and were called by writ to parliament. In the time of the Saxons, the bishops and abbots held their lands free from all secular service, but being charged by William I. with the same obligations as the laity, they became tenants *in capite*, and were bound to attend the Curia Regis, and afterwards the parliament. "Episcopatus," says Mathew Paris, "quoque et abbatias quæ baronias tenebant in pura et perpetua eleemosyna, et eatenus ab omni servitute seculari libertatem habuerunt, sub servitute statuit militari." Wherefore, by the Constitutions of Clarendon, in the reign of Henry II. it was expressly enjoined, that "Archiepiscopi, episcopi, et universi personæ regni qui de rege tenent in capite, habeant possessiones suas de rege, sicut baroniam; et inde respondeant justitiariis et ministris regis, et sequantur et faciant omnes consuetudines regias; et sicut cæteri barones debent interesse judiciis curiæ domini regis, cum baronibus, usque perveniatur in judicio ad diminutionem membrorum vel mortem."

Matt. Paris

Spelm. Cod. Vet. apud Wilk. LL. Anglo-Sax. Cruise on Dig. 52.

Although the constitution, above cited, comprehended abbots and priors as holding *in capite*, yet, if they held their possessions *de rege*, not *per baroniam*, but *in pura et perpetua eleemosyna*, then they were not to be summoned, and if they received any summons they were not bound

Seld. Tit. Hon. s. 24. Cruise on Dig. 53.

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to obey, in confirmation of which Selden mentions two cases in the reign of Ed. II. and Ed. III.

Cruise, ubi supra.

The right of archbishops and bishops, &c. to sit in parliament was not derived from their ecclesiastical dignities, but from their temporal possessions, which they held in right of their sees; for it commenced only when they received investiture, and ceased when, by any means, they lost possession, as, in case of being translated from one see to another, they could not sit in parliament during the interval. For this reason bishops are not called peers, because they have not, like all barons, an equal and permanent right to a seat in parliament.

All temporal lords or barons were probably at first bound by their tenure to attend the king both in the Curia Regis and in the Parliament, whenever it was summoned; and as in many instances this was a troublesome service to such as preferred martial pursuits, there was no occasion to set any limits to the number or quality of those who should attend, so that in all probability many tenants *in capite*, who held only by a small barony, were summoned as well as the wealthier barons; but it may be inferred from the manners of the age, and the awe in which inferiors then stood of those above them, that though present and having a voice, they did not take any material part in the deliberations of the assembly. Indeed, it appears from the historians of those times, that many persons were present at those councils who were there only from curiosity. Thus Eadmerus, speaking of the persons assembled in a great council at Rockingham, A. D. 1095, observes, "Anselm spoke to the bishops, abbots, and princes or principal men, and to a numerous multitude of monks, clerks, and laymen standing by." In some instances, the order of these meetings was interrupted by the crowd of bystanders, as in a great council held by King Stephen; it is thus described: "The king, by an edict, published through England, called the rulers of the churches, and the chiefs of the people, to a council at

Eadm. Hist. 26.

Gesta. Steph. Reg. apud Duchene. p. 932.

London. All these coming thither, as into one receptacle, and the pillars or heads of the churches being seated in order, and the vulgar also forcing themselves in on all hands, confusedly and promiscuously, as usual, many things were usefully and happily transacted, for the benefit of the church and the kingdom." In a great council held at Westminster, May 18, A.D. 1127, the conduct of the crowd was so outrageous as to put a stop to the proceedings.

Spelm. Conc. tom. ii. p. 35.

The inconveniences resulting from such promiscuous assemblies, naturally dictated the necessity of a change which took place in the reign of King John, when a distinction began to be made between the barons *majores et minores*, the former of whom claimed the right of being summoned by a special writ, and the latter, who held land of inferior value, or smaller parcels of land, immediately of the king by knight's service or escuage, were summoned by a general writ directed to the sheriff of the county. These *barones minores* were either *milites*, *armigeri*, or *generosi*, that is, knights, esquires, or gentlemen, who, although they had not the dignity of lords, were lords of manors, and had their courts-baron. From this period we find that, although every lord of parliament was a baron, yet every baron was not a lord of parliament, until he was summoned by special writ to parliament. It is said by Mr. Camden, on the authority of some ancient writer whom he does not name, that no person, though possessed of a barony, should come to parliament without being expressly and particularly summoned by the king's writ; for which it is assigned as a reason, that owing to the seditions and troubles of the times, the king claimed to himself the right of excluding from the parliament such as he thought proper; but these claims being expressly contrary to the provisions of the Magna Charta of King John were successfully resisted by the greater barons. The words of the charter are these, "to have a common council of the kingdom, to assess an aid otherwise than in the three foresaid cases, or to assess a scutage; we will cause to be summoned the archbishops, bishops, and greater barons, particularly by our

Spelm. Gloss. in Voc. Baro.

Co. 4 Inst. 47.

Pref. Cam. Britan.

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letters, and besides we will cause to be summoned in general, by our sheriffs and bailiffs, all those who hold of us *in capite.*" It is true that this clause is omitted in the charter of Henry III. which is commonly found in our books; and of course it was not the intention of the king to give up what he conceived to be his prerogative, but he was too weak to maintain it against the power of the nobles, which was opposed to him. On one occasion, as reported by the historian, King Henry III. called a parliament at Westminster, in 1225, when several of the peers being absent for want of writs of summons, the barons refused to proceed to business, *sine paribus suis absentibus.*

Matt. Paris, A. D. 1225.

Peers of parliament.

Henceforth the right as well as the obligation to sit in parliament was confined to all the greater barons, who, whatever was the distinction between them as to their titles and dignity, were peers or equals in their public capacity as members of parliament. As to the different orders and names or titles of nobility, those of earl and baron were the most ancient, and the only ones mentioned for some time after the conquest. These, as well as all other dignities existing in Europe at that period, were of feudal extraction, and being annexed to the possession of certain lands, were created by charter, containing a grant of the estate to which the dignity was annexed. Thus, when a king created an earl or a baron, he created an earldom and a barony, to which was originally annexed a certain jurisdiction; and such a grant was called by the feudists a *feudum nobile,* because it conferred nobility on the person to whom it was granted. There are no records extant of any such gra[illegible] [illegible] there can be n[illegible] [illegible] were made [illegible] a feudal princi[illegible] all [illegible]ame and dignity was [illegible] from *eorl* an[illegible] and corresponded to the *co*[illegible] Latin. Those on whom [illegible] dignity was confer[illegible] commonly a jurisdiction over a wh[illegible] whence the na[illegible] *comes* [illegible] who perform[illegible] f the [illegible]

Cruise on Dign. 55.56.

Earls.

Earldoms were some[illegible]es gra[illegible] the conquest in

such manner, that to the grant of an entire county was annexed *jura regalia*, whereby it became a county palatine, and the person on whom it was conferred acquired a royal jurisdiction and seigniory, as in the case of Hugh Lupus, who was created Earl of Chester. But for the most part, where the king created a person an earl, he granted him only the *tertium denarium*, or a third part of the profits arising from the pleas in the county court. In aftertimes, lands were sometimes granted to a person to hold *per servitium unius comitatus*, whereby he was created an earl of that county, and had a certain jurisdiction annexed to the grant; but finally it became the practice to confer the dignity and title of an earl without any thing further annexed to the grant.

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Ante, p. 4[illegible].

Seld. Tit. Hon. s. 10.

"It is impossible" says Mr. Cruise, "to ascertain at what period the possession of an earldom ceased to confer a right to be summoned to parliament as an earl." "But it appears," he adds, "from our ancient records, that one great honour (namely, the castle and honour of Arundel) retained that quality for a considerable time. In the 3d of Charles I. Thomas Earl of Arundel obtained a private act for annexing the castle and honour of Arundel to the title, name, and dignity of Earl of Arundel."

Cruise on Dign. 59.

Barons.

Barons answered, as before observed, to the thanes of the Saxons. The barons of the Normans, as well as the thanes of the Saxons, held certain lands of the king, by reason of which they performed, among other services, that of attendance upon the king in his parliaments or elsewhere, as the occasion required.

Dukes.

The title [illegible] unknown in England until the reign of Edward III. w[illegible] [illegible]ted his eldest son Duke [illegible] yet had existed for [illegible]ries in other [illegible] and like the two preceding [illegible]nts, [illegible]d from the [illegible] service which was [illegible]med to the king. Duke, [illegible] and *du*[illegible], to lead, were properly the [illegible]ders of [illegible] [illegible]erefore [illegible] the Saxons they were called [illegible] *here* [illegible] and *tohen*, to lead. The ear[illegible] [illegible]chs of [illegible]ons were originally

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LL. Edw. Conf. c. 3.

elected at the county courts, in the same manner as the sheriffs; but as their influence in the state increased, their office became hereditary. Thus, both by reason of their office and their tenure, the nobility of the realm, whatever title they were distinguished by, became peers of parliament and hereditary counsellors of the crown.

Blackstone's Tracts, 205.

As the number of the *barones minores* was, owing to the many alienations and minute subdivisions of property, become exceedingly large and troublesome, the king was obliged to direct a general writ to the sheriffs of counties, to send two or more knights from the several places specified in the writ, to be returned to sit in parliament as the representatives of the rest. The representatives of these inferior barons being usually knights (or such as held a knight's fee at least), and returned out of every county, were denominated Knights of the Shire, as those that were returned from particular towns were named Burgesses.

Knights of the shire.

Burgesses.

"In what manner and at what time the election," says Blackstone, "of those knights of the shire was invested in the county at large, which was formerly confined to the tenants *in capite* only, is a point pretty difficult to determine." The first writ of summons to elect and send knights, citizens, and burgesses to parliament was issued in 49 Hen. III., before which, as Mr. Prynne observes, there are no memorials or evidences of any such writs. This happened at the time when the king was in the power of the Earl of Leicester, who, wishing to make himself popular, and to set about the reformation of abuses, hit upon the scheme of causing four knights to be chosen of each county.

Blackstone's Tracts, ubi supra.

Writs of summons for electing knights and burgesses.

Prynne's Parl. Writs, ii. 1.

From this period, general and full parliaments consisted for the most part of all the clergy and laity who held of the crown by barony, and were summoned by particular writs, and of the representatives of all the smaller barons, and citizens, and burgesses. But the smaller barons were very differently represented, in different counties, and at different times; in some by one, in some by three, and in some by four commissioners, and the representation of cities and

Brady's Introduct.

boroughs was still more unsettled. The statute of West. 1 was made in a general parliament of the archbishops, bishops, abbots, priors, earls, barons, and all the commonalty of the realm. At a parliament holden at Shrewsbury, in 1283, after the conquest of Wales, two commissioners were chosen from each county, and two from twenty-one cities. In the parliament at which the stat. Westm. 3 was passed, the prelates, earls and barons were first summoned on the 1st of June; and, on the 14th, the king sent letters to the sheriffs, acquainting them that the earls and other great men having made some requisitions about which they wished to consult others of the county, he desired each of the sheriffs to cause two or three of the most discreet knights to be chosen and sent to parliament, three weeks after Midsummer at furthest; but burgesses were probably not required to attend, as no mention is made of them.

Parl. Hist. i. 86.

Brady's Introduct. 149.

The first regular summons we meet with for the election of burgesses was in the 23d year of Edward I.; but on many occasions there was no mention made of either knights or burgesses. If, therefore, any inference can be drawn from the practice of the times, it is clear that the commons were not as yet looked upon as any essential part of the legislature.

Pref. to Stat.

Attendance in parliament.

Attendance in parliament was indeed, at this period, a thing less sought for by the commons than by the kings, who were well pleased to give the people a voice in the legislature, as a check upon the domineering temper of the nobility. The Commons, on the other hand, feeling how little weight they had in the deliberations of the parliament, considered the burden of attendance to be greater than the honour.

For the same reason their constituents, who had to pay them wages, were sometimes glad to obtain an exemption from sending commissioners, and, pleading poverty, would apply to the sheriff, that they might be excused or overlooked. The number of representatives, therefore, sent by each city or borough, and also the number of boroughs or

Brady's Burghs, 58. 59.

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cities sending members, remained very long variable and unsettled. But at length the general rule of sending two members from each county, city, and borough, became by long usage established into a law, and in this manner the elective franchise was, by means of the king's writ, conferred on the several places which have enjoyed it for some centuries past

Walsingh. p. 371. Prynne's Parl. Writs, ii. 123.

As the summoning of the *barones minores* was heretofore a part of the king's prerogative, which he was left at liberty to exercise at his own discretion, the writs of those times were very particular in describing the qualifications of those who were to be returned as representatives. The electors were to choose not only actual residents in counties, cities, and boroughs, but the fittest and most discreet, as also the stoutest men, *potentiores ad laborandum*, that they might be able to endure the fatigue of the journey and of the close attendance. Also by an ordinance of 46 Edw. III. it was enjoined that no lawyer should be elected; but Lord Coke, who is not a little displeased at this invidious exclusion, maintains that parliamentary writs, no more than original writs at common law, could be altered but by act of parliament. Certain it is, that since parliaments have acquired an independent voice in the legislature, our kings have ceased to exercise this prerogative.

Rot. Parl. 49 Ed. III.

Brady's Introd. 158. 160. Dugdale's Summons to Parl. Hody's His. Convoc. 411. Co. 4 Inst. 47. 1.

For some time, the inferior clergy, like the laity, had their representatives, called *procuratores cleri*, who, together with those of the laity, were called the Commons. They continued to sit with the laity until the reign of Edward III. when, as they had not a voice like the laity, they withdrew to their convocations; and, as the king did not insist on their attendance, they by degrees lost their right to a seat in the lower house, although they afterwards made an attempt to recover this right.

Mode of electing knights and burgesses.

The mode of electing knights of the shire and burgesses was probably regulated by the usage which had obtained of electing sheriffs, coroners, and others, at the county courts, by the suitors or freeholders. That such was the

practice in this king's reign may be inferred from what is known in after times to have obtained, rather than from any direct notices on the subject.

Frequency of parliaments.

As to the frequency of parliaments it is difficult to determine precisely what was the practice among the Saxons. The Mirror says, it was ordained by Alfred, that there should be a meeting of these councils twice a year, or oftener if needful, to treat of the government of God's people, how they should keep themselves from sin, should live in quiet, and receive right; but it may more reasonably be inferred from the records of those times, that the Saxon kings assembled councils as often as the exigency of the times required, particularly when the defence of the country against invaders called for the united efforts of all subjects.

Mir. des Just. c. 1. s. 3.

Spelm. Concil. vol. i. Chron. Sax. passim.

After the Conquest, the Norman practice was introduced of the king's holding a great court at the three principal festivals, namely, Christmas, Easter, and Whitsuntide, which was attended by his vassals, both for purposes of pomp as well as of state. This, from its regularity, was called *curia de more*, or *curia de more coadunata*, to distinguish it from those meetings which were assembled by the king on particular occasions, and sometimes called *conventus procerum ex præcepto vel edicto regis*; but afterwards *concilium regni, &c.* In this manner parliaments were assembled at the discretion of the king, without any interference on the part of the barons, until the reign of John, when the latter was compelled to call a meeting, and to sign Magna Charta, by one provision of which the king bound himself to call a parliament for the assessment of any, except the customary aids. Although this provision was not inserted in the Magna Charta of Hen. III. yet the king thus virtually lost the discretionary power of calling parliaments; and by the stat. 4 Ed. III. c. 14, and 36 Ed. III. c. 10, it was ordained that there should be a parliament once a year, or oftener if needful: after which period, their prorogation and adjournment, &c. became more and more subject to parliamentary regulation.

Mad. Hist. Excheq. 1,2.

Cruise on Dign. 9.

Blackstone's Tracts, p. xiv.

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Manner of assembling parliaments.

Regist. 261. Co. 4 Inst. 3.

The manner of assembling parliaments was, as before observed, by means of the king's writ or summons. Whenever the king *de advisamento concilii sui*, that is, by the advice of his privy council, resolved to have a parliament, writs of summons were sent out of Chancery for the purpose of convening this assembly. On the introduction of special writs, their style was varied, according to the quality of the persons summoned. Before the reign of Edward III. the temporal lords of parliament were commanded by the king's writ to appear *in fide et homagio quibus nobis tenemini*; but in this reign they were sometimes commanded *in fide et homagio*, and sometimes *in fide et ligeancia*, according as they were barons by tenure or otherwise; since that period they have been constantly commanded *in fide et ligeancia*, because, as Lord Coke observes, there are no feudal baronies in respect whereof homage is to be done. Ecclesiastical barons were commanded by the king's writ to be present *in fide et dilectione quibus nobis tenemini*. The writs to the law officers, who were called to give their assistance in the upper house, but had no voice, had the words "ut intersitis nobiscum et cum cæteris de concilio nostro," and sometimes "nobiscum super præmissis tractaturi vestrumque consilium impensuri;" but the writ to the barons of the Exchequer ran thus, "quod intersitis cum prælatis, magnatibus et proceribus super dictis negotiis tractaturi vestrum que consilium impensuri," a difference which still continues.

Regist. 261. Co. 4 Inst. 4.

Among the Saxons the king appears always, or at least for the most part, to have taken a personal concern in all public matters, and consequently to have been present and presided at the national councils; but after the Conquest, our kings being frequently called out of the realm to attend foreign wars, it was usual for the king's person to be represented by the guardians of England, and finally by commission, under the great seal of England, to certain lords of parliament. It was necessary, at all times, that the king's majesty, either in person or by representation, should be present, the king being, as Lord Coke observes, the *caput*

Co. 4 Inst. 6.

principium et finis of every parliament. Without him a parliament could have no existence, nor could it make a beginning, but by the royal presence, either in person or by representation.

Sessions of parliament.

The sessions of parliaments were for many reasons short, at the early periods just referred to, particularly as the public business was despatched without much debating. In proportion as the two houses advanced towards independence, the proceedings in parliament became more orderly and also more multifarious. For some time after the *barones minores*, or Commons, were summoned to parliament, they continued to sit in the same house. But this was not uniformly the case, for in the reign of Ed. I. the representatives of cities and burghs, who were summoned to the parliament at Shrewsbury, A.D. 1283, appear to have met at the village of Acton Burnel, while the rest of the parliament sat at Shrewsbury. It should seem, likewise, that, in this same year, there were three parliaments sitting at the same time in three different cities, namely, York, Durham, and Northampton, to each of which the king sent commissioners to represent his person, while he was engaged in the conquest of Wales. But although sitting in the same place, yet these two estates of the realm gradually became more distinct, and, as early as the reign of Edward III., their deliberations were carried on apart.

Hody's Convocat. p. 153.

Parliaments were usually adjourned to some other day, when any number of the Lords and Commons were absent, and the declaration put off until all the members were come, and the parliament was full. All members were bound to be present, and not to depart before proclamation without licence.

Cott. Abr. 31.

The Lords sometimes, and the Commons frequently, were called over by name, the first day of the parliament's sitting, when absentees, who could not reasonably excuse themselves, were punished by the king, those among the clergy by the archbishop, at the king's command.

Ibid. 43.

At what period the parliament began to sit permanently in

Speaker.

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Co. 4 Inst. 2. Cott. Abr. 155. Parl. Hist. i. 339.

two separate houses, is no where mentioned by ancient writers, as this doubtless grew silently into a practice without exciting any particular observation. Lord Coke observes, that while they sate together they had no continual speaker, but after consulting among themselves, they fixed on some individual to deliver their resolution. Whence he infers, that the period of their division may be best known by the circumstance of their having a continual speaker; which probably commenced at the close of Edward III.'s reign, when the commons sat in the chapter-house of the Abbot of Westminster. The first on record who was chosen to the office of Speaker, in the first parliament of Richard II. was Peter de la More, knight of the shire for the county of Hereford. After the regular separation of the two houses, it appears that the knights of the shire were distinguished by name as a separate order from the Commons, who included the representatives of the cities and boroughs, and, on some occasions, it should seem, that they were not always united in their deliberations, the burgesses being sometimes detained after the dismissal of the knights, to consult on matters which peculiarly concerned the respective places they represented. It is, however, worthy of observation that, in the reign of Edward III., the parliament, as to its constitution, and as to its forms of proceeding, began to assume the settled form which it has since acquired.

Opening of parliament. Co. 4 Inst. 8.

On the opening of parliament, the king, or those appointed to represent him, declared, in the presence of the Lords and Commons, the purpose of their meeting, for the redress of matters touching the church and the affairs of England. If a bishop was lord chancellor, he took a text in Latin, and discoursed upon it; but when a judge was lord chancellor, he recited the causes of parliament in the form of an oration, after which the Commons were required, in the king's name, to make choice of their speaker, the king having previously nominated, as in the case of a *congé d'elire* of a bishop, some discreet and learned man whom the Commons might elect.

Humble address of the speaker.

Co. 4 Inst. ubi supra.

This being done, the person on whom the choice fell, used, with great profession of his own inability, to entreat them to fix on some one of greater ability, to undertake so weighty a charge, and after being constrained to take the chair, he then prayed leave to disqualify himself before the king: wherefore, on being presented to the king, in the Lords' house, he used to renew his protestations of inability to discharge the office. Sir John Cust was the last speaker who, in 1761, adopted this language of diffidence, since whose time the ceremony of addressing the throne by the speaker has been laid aside.

Petitions of the Commons.

Parl. Hist. i. 315.

But this tone of modesty and humility was not confined to the speaker of the lower house, for it was adopted by the Commons in all their proceedings, both towards the king and the upper house. Their wishes and suggestions were conveyed in the shape of petitions, which usually began with *Vos poveres communes prient et supplient*, "Your poor Commons beg and pray," and concluded with the conjuration *Pur Dieu et en œuvre de charité*, "For God's sake, and as an act of charity." To the upper house they looked for guidance and instruction; and when any matter of difficulty came before them, they petitioned that certain prelates and barons might be allowed to come to them and assist them with their advice.

CHAPTER XVII.

EDWARD III.

Redress of Grievances.—Receivers and Tryers of Petitions.—Legislation. — Laws and Constitutions.—Charters.— Statutes and Ordinances.—Acts of Parliament.—State of the House of Commons.—The Revenue. — Temporalities. — Corrodies and Pensions.—First Fruits.—Feudal Profits.—Deodands.—Profits from the Courts.—Farming of Boroughs.—Impositions upon the Jews. — Customs. — Aids. — Talliages. — Assessments of Tenths or Fifteenths. — Subsidies. — Questions of General Policy brought before Parliament.—House of Lords a Court of Judicature.—Judicature in the Council.—Criminal Jurisdiction. —Impeachments by the Commons.—Law and Privileges of Parliament.—Privilege of Person.—Liberty of Speech.—Privilege of Hunting in the King's Forest.—Proxies.—Protesting. Wages of Knights and Burgesses.—Going armed during Session of Parliament prohibited.

CHAP. XVII. EDW. III.

HAVING taken a general view of the origin and constitution of parliaments, from the earliest periods, it now remains to consider the business which engaged the attention of these national assemblies at this time.

Redress of grievances. Ryl. Plac. Parl. 240.

The redress of grievances being one of the principal ends of assembling parliament, every facility was given to the subject to convey his wants to the throne; accordingly, on the first day of parliament, proclamation used to be made at the door of the house, and in other public places, that all persons, who had petitions to present, should give them into the hands of those who were appointed to receive them. In consequence, petitions were presented, from all sorts of persons, and on all sorts of subjects, both of a public and a private nature, some of which were frivolous, and many

belonged to other jurisdictions, so that, for the greater despatch of business, the king appointed a certain number of the peers and bishops, called, from their office, Receivers and Tryers, to receive and examine the petitions; and, with the assistance of some justices, as also some masters in chancery, and civilians, as attendants, to distinguish such as belonged to the jurisdiction of parliament from those which did not, and to give the petitioners answers suited to the nature of the petitions, and the grievances complained of. If it were a matter that concerned the council, the answer was *Veigne devant la consail et declare la matiere contenue en la peticioun:* if a question of revenue, *Soit maunde as tresorier et barons de l'Excheqver*, &c.: if the petition related to any of the king's charters or grants, it was *Soit cette peticioun maunde en chancellerie:* but if it were a question of common law, the answer was *Sue a la comein ley*, or *Sue brief de trespass*, &c.

Receivers and tryers of petitions. Flet. 66. Reeves' His. ii. 409.

21 Ed. III. Rot. Parl. 24. 69, 70, &c.

The principal matters which came before parliament, besides the redress of grievances, and answers to petitions, were, the making of laws, and furnishing the king with supplies.

Legislation.

In the making or altering of laws, it is evident, from all historical documents, that the thanes of the Saxons, and the barons of the Normans, were usually consulted, so as to obtain their concurrence; but it does not appear that the consent of parliament was necessary to give force to a law, even long after it was regularly constituted. The king performed all legislative acts frequently by himself, and in him resided all the authority which was essential to render any measure binding. "The very frame, indeed," says Mr. Reeves, "of such laws, as were sanctioned with all possible formalities, carried with them the strongest appearance of regal acts. If a law passed *concilio baronum suorum*, it was still *rex constituit.*" And in another place, he adds, "It is the king who grants, directs, ordains, and provides, sometimes by his council, sometimes by the assent of the archbishops, bishops, abbots, priors, earls, and barons, and

Reeves' His. Engl. Law, i. 216.

Ibid. ii. 354.

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sometimes by the assent of the commonalty is added. In some there is no mention of any concurrence of any part of the legislature." William the Conqueror, and those who preceded him, spoke, for the most part, in the first person, in their laws, as *hoc quoque præcipio vel prohibeo,* and although, in some laws, he adopted the plural form, yet this style seems to have been chosen for purposes of regal pomp, rather than from any idea of associating others with himself, in the act of legislation.

As the form of a charter was not an unfrequent mode of making laws, this was naturally a royal act in the shape of a grant emanating from the sovereign. and deriving its validity solely from the authority of the person by whom it was conferred.

While the royal power was exercised, in the administration of justice, or in matters not immediately affecting the interests of the barons, it was not expedient to obtain their concurrence. Hence, we find, that king Edward I. fined and imprisoned his judges, in the same manner as Alfred the Great, among the Saxons, had done before him, by the sole exercise of his authority: so, likewise, the establishment of English law in Wales, Ireland, and Scotland, were acts of the king, without the intervention of parliament. When, however, the interests of different classes in the community became more diversified and complicated, and the necessity of observing a form and order, in all the public proceedings, became sensibly felt, the practice of submitting all laws to the revision and approval of parliament became gradually more and more established. Nevertheless, we find that, in the reigns of Edward I. and II., some laws, which acquired the force of statutes, were penned in the shape of writs, as the stat. *Circumspecte agatis,* 13 Ed. I., the stat. *de Militibus* 1 Ed. II. When, therefore, it is said, that a law, made without the assent of the lords, or of the commons, was void, it must be understood of a period much later than that which we are now treating of.

Before the Conquest, all public acts were called laws, if

they related to secular matters, and constitutions, or canons, if they related to ecclesiastical matters. They emanated from, and were probably penned by the king, after which they were laid before his *witan*, or wise men, and nobles, for their concurrence; wherefore, these codes were commonly prefaced in this manner, "Rex concilio sapientum suorum et procerum instituit." These laws were very simple, concise, and comprehensive, containing little more than general prohibitions against certain things, sometimes coupled with the punishment against the offenders, and sometimes with only a reference to the judgment of the courts and ministers of justice, to whose discretion, it appears, that all the details of administering justice were left, according to the forms and customs of the place.

Laws and constitutions.

Spelm. Cod. Vet apud Wilk. Ll. Anglo-Sax.

After the Conquest public acts were altered in their style and form, being, for the most part, delivered, either in the form of a writ, or a charter, of which there are numerous examples, from the time of the Conqueror to that of John, particularly the charters of Henry I., of Stephen, and of Henry II., which were spontaneous acts of the several kings, and so far distinguished from Magna Charta, which was obtained from John by an act of force on the part of the barons.

Charters.

Other public acts were termed *assisæ*, as the Assize of Arms, in the reign of Henry II., and the Assize of Bread and Beer, in the reign of Henry III., &c. or Constitutions, as the Constitutions of Clarendon, or *capitula*, that is, Articles of the Crown. After the parliament acquired a voice in the legislature, public acts began to be distinguished by the name of statutes, from *statutum*, that which was decreed, or appointed, signifying what was decreed by the king in parliament. It appears, however, that a distinction was made, in this reign, between a statute and an ordinance. If a bill did not demand *novel ley*, that is, if the provision sought for in the petition was in conformity with the law, as it then existed, it acquired, by the royal assent, given by the words *le roy le voet*, all the force of a law before

Statutes and ordinances.

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it had passed the great seal, or was entered on the roll called the statute roll. In such case it was called an Ordinance, and was considered as a measure of a temporary nature, that might be altered at the pleasure of the king. A statute, on the other hand, being, as the name implies, something of a more durable and permanent character, that was intended to form a part of the settled law of the land, it was framed with more deliberation, and, for the most part, with the advice of parliament, and was afterwards inserted in the statute roll. Thus, we find on one occasion, the king asked the Commons, whether the things granted to them, which were new and not before known, should be granted, by way of ordinance or statute; to which they answered, that it was good to have them by way of ordinance, and not by statute, to the end that if any thing required amendment, it might be amended. On another occasion, the king, by the assent of the Lords, made answer, that laws and processes, heretofore used, could not be changed without making new statutes.

Rot. Parl. 37. Ed. III. 38.

Hale's Hist. Com. Law, c. 1.

There appears, likewise, to have been a difference in the manner of publishing statutes and ordinances. After the statute was entered on the statute roll, the tenor thereof was annexed to proclamation writs, directed to the several sheriffs to proclaim it as law in their counties. Ordinances were never proclaimed by the sheriff, but the Commons were sometimes charged, by the king, to make known, on their return into the country, as in the case of an ordinance on the roll, referred to above, for regulating wearing apparel, they were enjoined to publish it, so that every one might wear apparel agreeable thereto.

Acts of parliament.

Acts of parliament were now, for the most part, drawn up, in the form of a law, by a committee of bishops, and others of the king's council, and then signed; after which they were reported *auditæ et publicatæ* to the king and his whole council, that is, the whole house of parliament, and being approved of, they were committed to writing for a perpetual memorial, and that they might be strictly observed.

Although the Commons were very active at this period,

State of the House of Commons.

they had but a very subordinate part in the office of legislation. Their assent was not deemed, in any shape, essential in the passing of a law. They were but petitioners, having the liberty of offering their petitions to the king and the upper house. In the statutes of Edward I. the assent of neither Lords nor Commons is mentioned, and in many of the statutes of this period the Commons are not so much as named; when they are mentioned it is only in the character of petitioner, the assent of the Lords being expressed in contradistinction to the complaint or request of the Commons, with the exception of some few cases, in the reign of this liberal prince, in which the law is said to be passed with the assent of the Commons. The petitions of the Commons, whether for the altering of the old law, or the making of new ones, were assented to, or denied them, wholly, or in part, at the discretion of the king. In this reign they began to lay claim to more attention, and renewed their petitions on the same subject when they wished to carry any measure. Sometimes the king would intimate that, *il s'avisera*, he would consult with his council, a term which has since been employed to denote a refusal on the part of the king; but being understood literally at that time, the Commons did not fail, when the answer was not given with sufficient despatch, to remind the king of their wishes: thus, in the 21st year of this king, when their petition about errors in the court of Exchequer was, as they chose to suppose, forgotten, they renewed it in the next year; so that, by a course of persistance, they sometimes succeeded, even after a lapse of years, in getting the subject of their petition passed into a law.

Elsynge, c. 8.

Pref. to Statutes at large.

Stat. 2. 25. 27. 28. 38. Ed. III.

Cott. Abrid. 56.

When any law was passed, in consequence of the petition of the Commons, but not in the form in which they proposed it, they were now grown bold enough to remonstrate; thus we find them praying, in the 22d year of this king, that the petitions, answered in the last parliament, might not, under pretence of any fresh bill or petition, be changed or altered. The king, who evidently showed a strong inclination to

Cott. Abrid. 70. 71.

favour the pretensions of the Commons, declared in parliament, that the petitions, showed by great men and the Commons, should be affirmed, as they were granted, some by statute, others by charter or patent; and they should be delivered to the knights of the shire, without their paying any thing. Nevertheless, it appears to have been understood, in this and several subsequent reigns, that nothing could be claimed, on the part of the Commons, but what was expressly granted, and their concurrence would be asked only in such matters as the king thought proper.

The revenue. The next matter, of parliamentary notice in this day, was the settling the king's revenue, or furnishing the king with supplies. The revenue of the crown had, hitherto, been derived from a variety of sources, sanctioned, either by the common or the feudal law; but as many of these, particularly of the latter kind, were indefinite in their amount, they were levied at the discretion of the king, until the reign of King John, from which period the king's revenue was distinguished into ordinary and extraordinary; that is, into that which had subsisted in the crown time out of mind, and that which, although levied by a customary exercise of the royal prerogative, was indefinite, in point of quantity, or only called for as the occasion demanded. To understand the state of the law, as regards the king's revenue, it will be necessary to consider, more particularly, some of the principal sources from which it was derived.

Temporalities. The temporalities of archbishops and bishops accrued, while the sees were vacant, to the king, as head of the church and the founder of all archbishoprics and bishoprics. This principle was recognised, and acted upon, in the time of the Saxons, as has already been clearly shown; but there was this difference before and after the Conquest, that the Saxon kings, being remarkable for their piety, and concern for the interests of the church, did not turn this to their own advantage, as the Conqueror and his son William did, who are said to have kept the sees vacant for a length of time, with the view of enjoying their profits. To remedy this evil,

Henry I., in his chapter, expressly renounced these advantages, which were to the detriment of the church; and his charter was expressly confirmed, in this particular, by his successors, to the present period. Of course this branch of the king's revenue became comparatively insignificant. Another ecclesiastical source of revenue were corrodies and pensions. Corrody, in the Latin of the middle ages *corrodium*, or *corredium*, from *con* and *edo*, to eat together, signified properly, eating with another; and, in law, the allowance of money, meat, drink, and clothing, due to the king, from an abbey or religious house, of which he was the founder, for the support of any one on whom the king might choose to bestow it. Pensions, from *pendo*, to pay, signified a sum of money given to one of the king's chaplains, for his better maintenance, until he was provided with a benefice.

Corrodies. Spelm. Gloss. Du Cange, Gloss. ad Voc.

Pensions.

Of the *primitiæ*, or first fruits, that is, the first year's profits of every living, and the *decimæ*, or tenth part of the annual profit of the living, I omit to speak here, under the head of the king's revenue, because they were not converted to the use of the crown until the reformation; but they had their origin in the reign of Henry III., when a rate or *valor* of ecclesiastical benefices was made, under the direction of Pope Innocent IV., and another valuation was made by order of Pope Nicholas III., A.D. 1292, to Ed. I., which is still preserved in the Exchequer. The object of these valuations, on the part of the papal see, was to secure a part of the church revenue in England as in other countries, particularly from the foreign clergy, on whom, through its influence, many benefices were bestowed. What steps were taken, in the reign of Edward I., to defeat this scheme, by the statute of Provisors, and others prohibiting church property from being carried out of the realm has already been shown elsewhere.

First fruits.

Co. 3 Inst. 154.

The feudal sources of revenue, namely, wardships, marriages, reliefs, aids, escheats, and the like, were, for the most part, sufficiently defined by the feudal law, so as to prevent all questions; but, it appears that in Glanville's time the

Feudal profits.

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reliefs of barons were levied at the king's pleasure, and that in consequence, it was provided, by a clause in Magna Charta, that they should not exceed the *antiquum relevium*, or that which had been customarily paid.

Ante, p. 75.

While military service was performed in person, its extent, according to the proportion of each man's property, was exactly defined; but, when the pecuniary compensation, called scutage, began, as before observed, to be received in its stead, it became necessary, for the quieting of men's minds, that the rate of payment should be assessed by parliament. In the time of King John, this was included among the extraordinary aids, which could not be levied without the express consent of parliament; but in the charter of Henry III. the scutage was fixed at the same rate as it had been in the time of Henry II. Subsequently, however, scutage was demanded also by the barons of their tenants, which made it necessarily a subject of parliamentary regulation.

Mag. Chart. 9 Hen. III. c. 37.

The ordinary aids, namely, *pur faire fil chevalier* and *pur file marier*, were levied at the discretion of the lord, before the reign of Edward I., when, to prevent them from being excessive and outrageous, it was declared that for the future there should be taken of a knight's fee twenty shillings, and the same sum of land in socage to the amount of twenty pounds; and so in proportion. In confirmation of this statute it was declared, that a reasonable aid, in such cases, should be levied of lands holden *in capite*, according to the abovementioned rule, and no other way.

Westm. 1. 1 Ed. I. c. 36.

The branches of revenue of a political nature, which the king had enjoyed by his royal prerogative from time immemorial, were wreck, treasure-trove, waifs, strays, forfeitures, amercements, and the like, of which sufficient mention has already been made.

Deodands.

Flet. l. 1. c. 25. Britt. fol. 6.

Among the judicial branches of the king's revenue, that of deodand is most entitled to notice. Deodand, from *Deo* and *dandum*, that is, literally, something given to God, was a forfeiture made to the king, to be distributed for pious uses

as a sort of expiation for the offence; or, as Fleta expresses it, "pro anima regis, et omnium fidelium defunctorum," This piece of old law was derived from the laws of Alfred, by whom it was adopted in imitation of the Mosaic institution; not merely from motives of piety, but also from those of policy, in order to punish for their negligence the owners or users of such things as did any one an injury. To constitute a deodand, it was necessary that the beast or thing should be in motion, by the rule in law, "omnia quæ movent ad mortem sunt Deo danda," as a mill-wheel, or the wheel of a cart, while the mill or the wheel is in motion. Of a ship or other vessel upon the high sea, or in *aqua salsa*, there was to be no deodand; but in *aqua dulci*, as in rivers, &c. there might be deodands; because accidents in the former case were supposed to happen from the sea, and in the latter through the negligence of man.

Bract. fol. 122. Flet. ubi supra. Mirr. c. 1. s. 13. Bract. ubi supra. Co. 3 Inst. 58.

Where any thing not in motion was the cause of a person's death, the part only which caused the death was a deodand; as if a man was killed by falling from the wheel of a cart, the wheel was forfeited; but when the person so killed was under the age of discretion, it was adjudged in the reign of Edward II. that the thing was not forfeited; probably, as Sir Matthew Hale supposes, because a child not being able to take care of itself, the fault rested with them who had the charge of it; in the other case, the fault was ascribed to the owner.

8 Ed. II. Cor. 389.

Profits from the courts. Seld. Tit. of Hon. s. 8.

The profits arising from the county courts, were divided between the king and the earls of the counties; two-thirds belonging to the king, and a third to the latter, except in the counties palatine, where the earls had all the *jura regalia*. The king's part of the profits was farmed from year to year by the sheriff, together with some other minor articles of revenue. In the same manner the farms of cities, towns, corporations, or guilds, brought considerable sums to the royal coffers at this period. As the cities and towns belonged for the most part to the king's demesnes, and the inhabitants held immediately of the king, they obtained

Farming of boroughs. Mad. Hist. Excheq. c. 10. Brad. of Boroughs, passim

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from time to time privileges both of a political and commercial nature, for which they, or those who farmed the corporations, agreed to pay certain sums yearly into the Exchequer.

Impositions upon the Jews.

To this branch of the revenue must be added another source which, though contrary to the humane policy of the present times, was sanctioned by the universal practice of all Christian states at that period, I mean the impositions which were from time to time laid by our kings upon the Jews. Whatever may have been the ostensible ground for making such demands upon this people, there can be no doubt but it was looked upon as the price which they ought to pay for permission to reside and trade in England. Nor was it unreasonable that they should contribute towards the support of the state, as they were exempt from the burdens which fell upon the rest of the people. These revenues were of such importance, that there was a particular exchequer, called the Exchequer of the Jews.

Mad. Hist. Exchеq. 153.

Customs.

The commercial branches of the revenue were known by the name of *consuetudines*, *custuma*, or customs, that is, customary duties payable by merchants upon the exporting of wool, woolfels and leather; of the same nature was the butlerage, a custom of two shillings, paid to the king for every tun of wine brought into England by strangers; and prisage, a custom of two tuns of wine, payable to the king, out of every ship importing twenty tuns or more, that is one before the mast and the other behind, paying twenty shillings for each tun, which was called *certa prisa*, *recta prisa*, and *regia prisa*. Butlerage was the name given to the one custom, because the king's chief butler received it; and prisage was so called, because it was a certain taking of wine for the king's use. Although these customs, as their name imports, belonged to the king by immemorial usage; yet, as commerce varied, they became a subject of parliamentary notice, *custuma antiqua sive magna* were granted by the stat. *Confirmat. Chart.* chap. 11, to the king for transportation of three things, that is, wools, woolfels, and leather;

Flet. l. 2. c. 21. Rot. Parl. 28 Ed. I.

Stat. Confir. Chart. c. 11.

that is for every sack of wool, containing thirty-six stone, and every stone fourteen pounds, half a mark; for three hundred woolfels, half a mark; and for a last of leather, thirteen shillings and four-pence, to be paid as well by strangers as by English. By a statute in the 21st year of this king, a subsidy of cloth was granted, which was the first act of parliament which gave any such subsidy.

Co. 4 Inst. 29.

From the above view of the king's ordinary revenue it may be seen, that our kings had hitherto been abundantly supplied with every thing that was needful both for purposes of state and their own private support, without applying to parliament for any aid; but by reason of the grants and concessions made at different times, and the relinquishment altogether of some branches of the revenue as before noticed, the king's revenue had at this period experienced considerable diminution from what it was at the time of the Conquest. This, added to the frequent and expensive wars which had been carried on by some of our kings, rendered it necessary to supply the deficiency by levying taxes upon the subject, under the general name of aids or talliages. Aids, which was a feudal term, was also employed to denote that which was raised upon the people to aid the king upon particular emergencies. Talliage, from the French *tailler*, to cut, is supposed to signify a portion or grant cut off or taken from a man's possessions; but it may with more probability be derived from the Latin *tallia*, a small twig; whence tally, a small stick, for the purpose of reckoning upon by means of notches or marks; also the reckoning itself, and talliage, a levying of money according to a rate or assessment. These talliages were differently named, according to the circumstances under which they were imposed; thus *Danegeld* was formerly a talliage for raising money to be given to the Danes; hidage was a talliage of so much money, payable on every hide of land; scutage was a talliage payable on every knight's fee. Talliage was also used in a particular sense, for the assessments of tenths or fifteenths, that is the tenth or fifteenth part of a man's moveables, which were for

Aids.

Talliages.

Spelm. Gloss. Du Cange, Gloss. ad Voc.

Assessments of tenths or fifteenths.

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Matt. Par. A.D 1232.

3 Comm. 308.

Subsidies.

the most part levied in cities, boroughs, or towns. These assessments (a commission for which is to be met with in Matthew Paris), were at first variable; but in the eighth year of this king's reign a new assessment of every township, borough, and city in the kingdom, was made by virtue of the king's commission. This assessment was recorded in the Exchequer, and served as a rule for all future assessments. When these aids and talliages were levied by act of parliament, they acquired the general name of subsidies, which from the Latin *subsidium*, help or assistance, had the same meaning as the word aid.

Whether the parliament had any voice in the levying of aids before the reign of King John it is not easy to ascertain. Many, judging from what has since obtained, take it for granted that no taxes were ever levied in England without the assent of parliament; but this does not appear to have been the case, at least after the Conquest. Among the Saxons, the ordinary revenue of the crown was probably not more than sufficient for the supply of the king; and, as the country was perpetually exposed to hostile invasions and attacks, all the supplies necessary to meet the extraordinary expenses of defending the country were voted in their national councils. After the Conquest, the power of the crown, and also its resources, were greatly enlarged; so that few extraordinary supplies were wanted, and these few were levied at the discretion of our kings. Scutage, as all historians agree, was assessed, on its introduction by Henry II. in whose time the reliefs of barons were also estimated at the king's pleasure. It is also clear, from the whole tenure of Magna Charta, that the object of the barons was only to define the feudal burdens to which they were subject by the common law; and that application to parliament was not required to be made only in case any extraordinary supply was wanted. Although the clause on this subject was omitted in the charters of Henry III., yet the necessities of this prince compelled him more than once to have recourse to parliament for supplies.

Glanv. l. 9. c. 4.

Edward I. expressly declared in the stat. *Confirmationes Chartarum*, as also in the stat. *De Tallagio non concedendo*, that no talliage or aid should be levied without the consent of parliament; but this was to be understood with the exceptive clause in King John's charter, of all customary aids and impositions which the king, by force of his prerogative, might levy at his pleasure, as he had done heretofore. Edward III. confirmed all the charters of his ancestors, and in point of practice adhered for the most part to the letter of these grants; but he reserved to himself the right of taxing his subjects without their consent if he found it needful. Thus, upon a petition praying "That the prelates, earls, barons, commons, citizens, and burgesses of England, might not be charged but by common assent," &c.; the king answered, "That he is not willing to do it without great necessity and for defence of the realm, and where he may do it with reason."

Rot. Parl. 51 Ed. III. nu. 25.

At the period we are now treating of, supplies were granted by the Lords and the Commons, as also by the clergy separately, each settling the proportions of their goods or money which they proposed to grant, whence it happened that the grants of these three bodies were not only in different proportions, but also of different kinds: one body granting a certain proportion of their corn and cattle, another a certain quantity of their wools, and the third a certain sum of money. That the office of granting supplies was new to the Commons is clear from one circumstance, that when they granted a supply of 50,000*l*. at a parliament holden at Westminster, in 1371, they imposed a tax of 22*s*. upon each parish, supposing the number of parishes to be forty-five thousand, instead of which they were not a fifth of that number, and of course not more than a fifth of that sum could have been raised. To rectify this mistake, the king assembled a certain number of prelates and lords at Winchester, together with half of the knights and burgesses of the last parliament, and assessed the tax afresh.

Hen. Hist. vol. viii. 142.

Parl. Hist. i. 330. Cott. Abrid. 45 Ed. III.

But the deliberations of parliament were not confined to

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Questions of general policy brought before parliament.

Hist. Parl. ii. 286.

matters of legislation or revenue. It was now beginning to be the regular practice to consult parliament on matters of peace and war, treaties, and other points of general policy. Thus, in the 28th year of this king, the whole house was informed that there was a treaty of peace between the king and the French, and it was demanded of the Commons whether they would agree. Their answer to this was, that therein they wholly submitted themselves to the orders of the king and his nobles. From this circumstance, it is clear that the Commons were at present unused to take cognizance of such things. At the same time as they were called together to consult for the good of the nation, or as the writs of summons stated *ad audiendum, faciendum, et consentiendum;* this indefinite commission gave them a licence to offer whatever they thought proper in the shape of petitions, which they sometimes did without sufficient discretion. The barons in the reign of Henry III. wanted to regulate the king's household, and to appoint the great officers of the crown, as the chancellor, justiciary, and treasurer; but this the king absolutely refused, at the same time sharply rebuking them for their unreasonableness. In the reign of this king the Commons made a similar effort, and at first with more success. They petitioned that the chancellor might be chosen in parliament; and the king, in his over-compliance, was induced to grant their request; but, repenting of the concession that he had made, he, by his writ, repealed what had been passed by statute; so indefinite and unsettled was the prerogative of the crown and the jurisdiction of parliament at this period. At the same time this king lent a willing ear to the petitions of the Commons, and in this form they offered him their advice on almost every subject of domestic policy. Some of these petitions tended to restrict the king's prerogative in different ways, as in the following cases:

Co. 4 Inst. 14.

Parl. Hist. i. 50.

Hist. Parl. ii. 245.

Hist. Parl. ii. 239.

Commons.—That every man for debts due to the king's ancestors, may have therefore charters of pardon, of course out of the Chancery.

King.—The king granteth.

Commons.—That certain persons, by commission, may hear the accounts of those who have received wools, moneys, or other aids for the king, and that they may be enrolled in the Chancery.

King.—It pleaseth the king, so as the treasurer and the lord chief baron may be joined in the commission.

Some petitions had respect to the administration of justice, as:

Commons.—That all men may have their writs out of the Chancery for only the fees of the seal, without any fine, according to the great charter, *nulli vendemus justitiam.*

King.—Such as be of course, shall be so; and such as be of grace, the king will command the chancellor to be gracious.

Commons.—That the chancellor and other officers of state there named in the records may, upon their entrance into the said offices, be sworn to observe the laws of the land and Magna Charta.

King.—The king willeth the same.

Commons.—That the justices of the peace be of the best of every county, and that, upon the displacing any of them, others be put in at the nomination of the knights of the said county; that they sit at least four times every year; and that none be displaced, but by the king's special command, on the testimony of his fellows.

King.—This first petition is reasonable, and the king will see that it be done.

From this specimen of petitions and answers the reader may form a judgment of the character and office of the House of Commons at this period.

House of Lords a court of judicature.

The House of Lords was now become a regular court of judicature, a change which had gradually and naturally sprung out of the practices of former times. Among the Saxons, the thanes were called upon to decide in the county courts all civil suits between persons of their own condition; and, after the Conquest, it appears that the barons, or tenants *in capite*, were bound to assist the king when required, not

Ante, p. 221.

only in his councils but in his courts, all the nobles being considered as hereditary counsellors of the crown. Of these, however, but a small number took any active part in public matters, during several reigns subsequent to the Conquest. The administration of justice was left to the king and his justices in his courts, or to the king and his council in matters of appeal, as had heretofore been the practice among the Saxons. Until the reign of Edward I. petitions were commonly addressed *à notre seignour le roi et à son conseil*, and appeals were said to be made *coram rege ipso in concilio*; but when petitions began to be received in parliament, then they were said to be *coram rege in parliamento*. Hence, by degrees, the House of Peers became a regular court of appeal; and by the stat. 14 Ed. III. st. 1. c. 5, it was ordained that in every parliament there should be chosen a prelate, two earls, and two barons, who should have commission from the king to hear, by petition delivered to them, all complaints of delays, as well in the Chancery as in the King's Bench and Exchequer; and, after examination into the causes of such delays, they were to proceed to take a good accord, and make a good judgment. And according to such accord, the tenour of the record, with the judgment accorded, were to be remanded before the justices where the plea depended, for them to give judgment according to the record. It was further ordained, that in case of doubt and difficulty, the matter was to be referred to the whole parliament, whereby the judicial character of the upper house was fully established; and, after a time, all causes might be removed from the court of King's Bench and the court of Exchequer Chamber to the House of Lords, as a tribunal of dernier resort.

Ante, p. 26. Reeves' His. of Eng. Law, ii. 408.

Stat. 14 Ed. III. st. 1. c. 5.

Judicature in council.

The king, according to ancient usage, still heard and determined, with the advice of his council, all matters which were referred to him; but, in proportion as the powers and privileges of parliament were extended, this extraordinary jurisdiction was eyed with much jealousy, and restrictions were imposed upon appeals to the king in council, to prevent them

Ante, p. 26.

from being burdensome, frivolous, and vexatious. As such appeals were ordinarily made by petition and suggestion, the statute 25 Ed. III. ordained that, according to the great charter, no one was to be taken on a criminal charge by petition or suggestion made to the king or his council, unless by indictment or presentment of good and lawful men of the neighbourhood where the fact was done; and, in civil matters, no one was to be ousted of his freehold unless he was brought to answer by due course of law. For the prevention of false suggestions, the party making suggestions before the chancellor, treasurer, and council, was obliged to find surety for the prosecution of his suit; and, if the suggestions were found to be false, he was to be committed to prison, until he had made compensation to the defendant for the damages he had sustained, and paid a fine to the king.

Stat. 25 Ed. III.

Criminal jurisdiction.

Ante, p. 32.

The criminal jurisdiction of parliament was put on the footing that it had been among the Saxons. The thanes heard and determined all matters, both civil and criminal, that concerned persons of their own condition. The introduction of the trial by duel, at the Conquest, interrupted this wholesome practice, which the laws of Henry II. brought again into favour, and the provision in the great charter finally re-established. The Lords, however, owing to the turbulence of the times, and their own inexperience in judicial proceedings, were very informal and irregular on many occasions: thus, in the early part of this reign, they had, contrary to the clause in Magna Charta, been led to sit in judgment on Roger Mortimer and many commoners, concerned in the death of the late king: but, in order to prevent this from being drawn into a precedent, they came to the resolution, and caused it to be entered on the roll, that it was assented to, and agreed by, the king and *touts les grantz*, that though the peers had taken upon them to give judgment, with the king's assent, upon certain persons who were not peers, yet, in future, no peer should be held or charged to give judgment on any other than their peers.

4 Ed. III. Rot. Parl. 6. 16.
Reeves' His. ii. 413.

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Hence we find, that when Sir Thomas Berkeley was to be tried for the offence of murdering the king, the record runs thus, "De hoc, de bono et malo ponit se super patriam. Ideo venerunt inde juratores coram Domino Rege in Parliamento suo."

Impeachments by the Commons.

The Commons now, likewise, took a part in judicial proceedings so far as to become public accusers for high crimes and misdemeanors, which was afterwards known by the name of impeachment. The first person on record, who was impeached by the Commons, was Sir John Lee, at the latter end of this reign, for malpractices while steward of the household. This was followed by many impeachments which were in after times tried by the peers.

42 Ed. III. Rot. Parl. 20.

Laws and privileges of parliament.

The last point of consideration, in regard to parliament, are, the laws and privileges which peculiarly belonged to it, the *lex et consuetudo parliamenti.* One of the most ancient privileges of parliament was, the privilege of person, or an exemption from arrest, in going to, attending upon, and returning from parliament; an immunity which was granted to them by the Saxon laws: "Ad synodos venientibus, sive summoniti sint, sive per se quid agendum habuerint sit summa pax." But it appears that the same privilege was, at that time, extended to every one going to or coming from any court of justice, unless he was a thief.

Privilege of person.

Leg. Edw. Conf. c. 3. 35.

LL. Can. c. 108. apud Spelm. Gloss. Voc. Gemote.

They enjoyed this privilege of person, not only for themselves, but also for their servants and their cattle, as appears from records, in the reign of Edward II. It commenced, as many days before the beginning of a session, as enabled them to travel from their own houses to the place where the parliament was to meet, and continued during the continuance of the session, and as many days after as enabled them to return home, but not a day longer.

8 Ed. II. Rot. Parl.

Prynne, Parl. Writs, v. 628.

Liberty of speech.

Another privilege was liberty of speech, which was particularly solicited of the king, by the speaker, at the opening of a new parliament; this was granted, under certain restrictions suited to the subordinate part which the lower house had at that time assigned to them.

By the *Charta de Foresta* it was granted to the peers, as before observed, to have the liberty of killing one or two of the king's deer, in the view of the forester, as they were passing through the forest in their way to parliament. The first mention of proxies that occurs in our parliamentary memoirs was at Carlisle, in the reign of Edward I.; also, in a parliament held at Westminster under Edward II., the bishops of Durham and Carlisle, being engaged in the defence of the marches of Scotland, were severally commanded to stay there, and a clause was inserted in the writ to that effect. Frequent examples occur, in this reign, of peers making proxies, by the name of *procuratores sufficientes*, but this was always done *licentiâ regis*, by the express licence of the king, a form of expression, still preserved in entering proxies in the House of Lords. Besides, the Lords had the liberty of calling for the assistance of the judges, whenever they found it needful to consult with them on points of law. The judges were, in this case, denominated attendants.

Privilege of hunting in the king's forest.
Ante, p. 146.
Proxies.
Hist. Parl. i. 7.
Prynne on 4 Inst. 633.
Seld. Tit. Hon. 610.
Nichol's Hist. Lib.

The practice of protesting began in the reign of Henry III., when the barons took upon them to protest against the measures of the king, but the regular parliamentary proceedings of protesting against decisions of the majority in parliament, did not commence until after this reign.

Protesting.
Hist. Parl. i. 39.

It appears, likewise, that, at this time, the Lords claimed, that offences, committed in parliament, should be heard and determined *secundum legem et consuetudinem parliamenti*, and in no inferior court; maintaining that, as every court of justice had laws and customs, so, more especially, had the High Court of Parliament its own laws and customs, which were distinct from the common law, the civil law, and the canon law. The king, on the other hand, considering that this claim materially affected the prerogative of the crown, did not yield it willingly. In the early part of his reign, a charge of contempt was brought against the bishop of Winchester, that he *recessit ab Parliamento sine licentia regis*, on which the bishop pleaded to the jurisdiction, and, as appears from the record, cited by

Co. 4 Inst. 14.
Co. 4 Inst. 16.

Lord Coke, the plea was not overruled. This point was not, however, determined, until long after the reign of this king.

Wages of knights and burgesses.

As soon as the practice was introduced, of choosing knights of the shire, citizens, and burgesses, to represent counties, cities, and burghs, the representatives were entitled to receive wages from their constituents, for the number of days they were absent, from the time of their setting out, to the time of their return. The amount of these wages appears, however, not to have been fixed, until the reign of this prince, when the fee of a knight was to be four shillings per diem, and that of a burgess two shillings. If the representatives failed in their attendance, to the last day, they could not claim their wages, otherwise, in case of non-payment, they might sue for them. This practice of receiving wages was continued until after the restoration. It is said that Andrew Marvel, who was member for Hull, in the parliament after the Restoration, was the last person, in England, who received wages from his constituents. As the peers in parliament sat in their own right, and attended at their own expense, they contributed nothing towards the expenses of knights of the shire, unless they purchased lands which were burdened with this tax; in which case it was enacted, in the subsequent reign, that they were to contribute, in respect of such lands.

46 Ed. III. nu. 45. Rot. Parl. 51 Ed. III. nu. 45.

Stat. 12 Ric. II.

Going armed during session of parliament prohibited.

To prevent any molestation to the members, on their going to the house, or any disturbance of the public business, while they were sitting in parliament, a proclamation was made in Westminster, at the beginning of the parliament, prohibiting any one from going armed, and also from the exercise of all sports and pastimes in the vicinity.

Co. 4 Inst.

As parliament was one of the king's councils, and every member summoned thereto was under an obligation to attend; so, likewise, he might not depart therefrom, except *licentiâ regis*, under pain of being fined at the king's pleasure: a point of the king's prerogative, which being rarely exerted, naturally fell into desuetude, and finally ceased to exist.

CHAPTER XVIII.

EDWARD III.

Statute Law.—Administration of Justice in Ireland.—Lancaster erected into a County Palatine.—Confirmation of the Charters.—Provisors and Provisions.—Peter Pence.—Premunire.—Privileges of the Church.—Trade and Commerce.—Commencement of the Poor Laws.—Law of Landed Property.—Uses.—Denization of Children.—Administration of Justice.—Court of Exchequer.—Court of the Steward and Marshal.—Marshal of the King's Bench.—Commission of Nisi Prius.—Justices of the Peace.—Court of Quarter Sessions.—Coroners, Sheriffs, and Jurors, regulated.—Protections restricted.—Pardons restricted. Arrest for Debt.—Delays in conducting a Suit prevented.—Statute of Jeofail.—Pleadings in English.—Jury de Medietate Linguæ.

Statute law.

THE proceedings in parliament are the next subject which demands our attention, in considering the state of the law in this reign. As Edward III. was friendly to parliaments, the number of parliamentary enactments greatly exceeded that of his predecessors, upwards of fifty statutes having been passed in the course of fifty years.

Administration of Justice in Ireland.

Stat. 31 Ed. III.

Reeves' His. ii. 363.

One of the principal statutes, of a political nature, was, the *Ordinatio pro Statu Hiberniæ*; the object of which was, like the statute of the same title, in the reign of Edward I., to bring the administration of justice, in that kingdom, into greater conformity with that in England. It should seem that the two superior tribunals, as also the parliament and council, were introduced into the kingdom by virtue of this statute.

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Crowns of France and England separated.

Edward having assumed the title of king of France, it was apprehended, if ever the two crowns should be united in one person, that England being the smaller kingdom of the two, might become subject to France; against which the king expressly provided, by a statute, in the fourteenth year of his reign, declaring that England should never be subject to him or his heirs as kings of France.

Lancaster erected into a county palatine.

Rot. Parl. 36 Ed. III. nu. 36, et seq.
Co. 4 Inst. 104.
Tyr. Hist. vol. iii. 567.
Rot. Pat. 50 Ed. III.

The erection of the county of Lancaster into a palatinate in favour of his son John, was another important act in this reign. In the 36th year of this king, he girded his son John with a sword, and set on his head a cap of fur, and upon the same a circle of gold and pearls, and named him Duke of Lancaster, giving him a charter, similar to what had been granted to Henry, Duke of Lancaster, the second duke of England.

In his 50th year he confirmed this act in a more solemn manner, by erecting the county of Lancaster into a county palatine, and making a grant thereof to the Duke of Lancaster, whereby he gave him the power of having a Chancery, and issuing writs therefrom, as also the power of appointing justices, to hear and determine all pleas, civil and criminal, with officers for the due execution of justice, "et quæcumque aliæ libertates et jura regalia ad Comitatum Palatinum pertinentia, adeo libere et integre sicut comes Cestriæ dignoscitur obtinere." This distinguished honour, which was conferred in open parliament, with all solemnity, was in imitation of the grant made by the Conqueror to his nephew, Hugh Lupus, of the royalty and prerogatives of the county palatine of Chester. A similar franchise had also, for some time, been enjoyed by the bishops of Durham in their bishopric, but by which king it was granted is not known.

Confirmation of the charters.

Reeves' His. ii. 368.

As this king was solicitous to secure to his subjects the rights and privileges which had already been granted by his predecessors, the confirmation of the two charters is to be found repeated in almost every statute, in one shape or another, but particularly in the statutes of the 1st, 2d, 5th,

10th, 31st, 37th, 38th, 42d, and 50th, of this king. Annual parliaments were now ordained by stat. 4 and 36 Ed. III. Numerous provisions were likewise made to remove the grievances arising from purveyance. Among other things it was enacted, that there should be no purveyance, but for the house of the king and queen, that nothing was to be taken, but at the fair appraisement, and for ready money, and above all, that such dealings might be put on the footing of fair buying and selling, the last statute on this subject ordains, that the heinous name of purveyor should be exchanged for that of *achetour*, buyer. Any taking, by way of purveyance, otherwise than was lawful, was made felony.

Stat. 4 Ed. 3. c. 14. Stat. 36 Ed. 3. c. 10. Stat. 4 Ed. 3. c. 3. Stat. 34 Ed. 3. c. 2. 3. Stat. 25 Ed. 3. st. 5. c. 1, 2. Stat. 36 Ed. 3. st. 1. c. 2.

Provisors and provisions.

The claims of the church were not so thoroughly adjusted, as not to require still farther legislative interference. The evil practice of carrying church property out of the kingdom continued, notwithstanding the statute of Carlisle, *De Asportatis Religiosorum*. For the evasion of this last statute, it was now usual to employ persons called provisors, who purchased the provisions of abbeys and priories, for the purpose of sending the money, annually, to Rome. To put a stop to this practice, the stat. 25 Ed. III. put out of the king's protection all persons that purchased such provisions, and treated them as the king's enemies. This was followed by other statutes on the same subject, in the 27th and 38th years of this king. Besides, peterpence was prohibited by an ordinance in the 40th year of this king. This tax, which was the principal drain, whereby the money was carried out of the realm, was, says Stowe, "the king's alms and all that had twenty pennyworth of goods, of one manner of cattell in their house of their own proper, should give that penny at Lambeth." Notwithstanding the abovementioned ordinance, Fabian relates, that peterpence was gathered in some shires, and was not entirely done away until the Reformation. Peterpence is said to have been introduced, by King Ina, about A.D. 680, who granted it to the see of

Ante, p. 170.

Stat. 25 Ed. 3. st. 5. c. 22. and st. 6. c. 2. Stat. 27 Ed. 3. st. 1. c. 1. Stat. 38 Ed. 3. st. 1. c. 4. and st. 2. c. 1, et seq.

Peterpence.

Stowe's Chron. 461. Fabian's Chron. 40 Ed. 3.

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Rome, in consideration of an English seminary, or school, to be continued there for ever.

Præmunire. Stat. 27 Ed. 3. st. 1. c. 1.

The suing out of process at the court of Rome was another abuse which continued, notwithstanding the measures that had been adopted to put a stop to it. As a further means of preventing it, the stat. 27 Edward III. gave a writ of *præmunire* against such as should presume to cite any of the king's subjects to the court of Rome. This writ was so called from the words with which it commenced, "Præmunire facias, A. B." &c. that is, cause A. B. to be forwarned to appear, &c.; whence, not only the writ itself, but the whole proceeding, was named a *præmunire*, from *præmunio* for *premoneo*, to forewarn.

Privileges of the church. Stat. 1. Ed. 3. st. 2. c. 2. 10. Stat. 14 Ed. 3. st. 4. Stat. 18 Ed. 3. st. 3. c. 1, 2, 3. 5, 6. Stat. 50 Ed. 3. c. 5. Stat. 25 Ed. 3. st. 4.

The property and privileges of the church were protected by several statutes. The king bound himself not to demand of bishops and religious houses any pensions, corrodies, prebends, &c. for persons, but in cases where he might in conscience do so; and not to seize into his hands the temporalities of bishops and abbots without just cause. The king's purveyors were likewise prohibited from taking any thing within the fees of prelates and other ecclesiastics without the consent of the owner. By statute 18 Edward III. an archbishop was not to be impeached criminally before the king's justice, nor any prohibition awarded out of Chancery without the king's cognizance; nor writs of *scire facias* be brought against ecclesiastical persons; besides, the clergy were exempted from arrest during divine service, by a statute in the 50th year of this king. A statute in the 25th year of this king, particularly designated by the title of *Statuto de Clero*, contains a variety of provisions on the subject of presentations, indictments of spiritual persons and the like, with the view of redressing the grievances complained of by the clergy.

Stat. 31 Ed. 3. c. 11.

To check some abuses by the bishop's officers in the administration of intestates' effects, a statute in the 31st year of this king directed that *de plus procheins et plus loialx*

omis of the deceased should administer his goods, and have the same power and office as executors.

Trade and commerce.

As trade and commerce were now becoming objects of consideration, the king, in imitation of his predecessors, was solicitous to put them on such a footing as would be most conducive to the interests of the nation. It had hitherto been the practice to confine trade to certain places, both in England as well as beyond sea, which were called staples, from the German *stapel*, a mart or market. This king thought that, by doing away with these staples, and allowing all merchants, as well aliens as natives, to go and come with their merchandises in England, according to the great charter, that he should draw foreigners to this country, and concentrate the trade within the kingdom; in furtherance of this object, and not, as Mr. Barrington supposes, out of any disgust which the king had conceived against the Flemings, it was enacted that all staples should cease. Afterwards, it was thought proper to re-establish staples, which was done by a statute passed in the 27th year of this reign, distinguished by the name of the Statute of the Staple, whereby staples were re-established in different places in England, Wales, and Ireland, as Newcastle-upon-Tyne, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter, Bristol, Dublin, Waterford, Cork, Drogheda, &c. By this statute various regulations were made to give efficacy to the measure. All merchants, English, Welsh, or Irish, were prohibited from exporting goods on pain of life and limb, and forfeiture of their goods and chattels to the king, and of their tenements to their chief lord. If any outrage or grievance was done to merchant strangers in the country out of the staple, the justices of the place were to do speedy justice to them, from day to day and from hour to hour, and so that they might not be delayed from their business unnecessarily, nor driven to sue at common law. It was moreover enacted, that no merchant stranger should be impeached for another's trespass or debt, in which he was neither debtor, pledge, nor main-

Barr. Obs. Stat. 2 Ed. 3.

Stat. of the Staple, 27 Ed. 1. st. 2.

Stat. 27 Ed. 3. c. 17.

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pernour. It appears, however, that the Lombard-merchants, having escaped out of the country without satisfying their creditors, they were excepted from this statute; for, by a statute in the 25th of this king, it had been ordained, that if any merchant of the company of Lombard-merchants acknowledged himself bound in a debt, the company should answer for it; but a merchant not of the company, was expressly exempted from the liability.

25 Ed. 3. st. 5. c. 23.

Court of the Mayor of the Staple.

For the government of the merchants residing in the staple, a court was erected in every town where there was a staple, called the Court of the Mayor of the Staple.

Co. 4 Inst. 237.

This court was to be guided by the law merchant, that is, the uses and customs of merchants, in all things touching the staple, and not by the common law of the land. Merchants coming to the staple, and their servants, were to plead and be impleaded, not before the justices of these places, but only before the mayor and justices of the staple, of all manner of pleas and actions whereof the cognizance belonged to the staple. In contracts between merchant and merchant, and in all matters of trespass, where one of the parties was a stranger, the plaintiff might either sue at the staple or at common law. This statute was followed by others on the same subject. The staple commodities of England, or those which were to be brought to the staple, were wool, woolfels, leather, and lead.

Stat. 28 Ed. 3. st. 1. c. 7. Stat. 36 Ed. 3. st. 1. c. 7.

Stat. 11 Ed. 3. c. 5.

Several enactments were likewise made for the encouragement of our manufactures. Inducements were held out to cloth-makers from abroad to settle here, by various laws which were made for their protection. None but cloths of home manufacture were to be worn, the texture, size, and proportions of which were defined by a particular statute in the 25th of this king, called the Statute of Cloths. Besides, artificers were put under several restrictions, the apparel of all ranks was regulated, and fair dealers were protected by provisions against forestalling and engrossing.

Stat. 25 Ed. 3. st. 4. Stat. 37 Ed. 3. c. 5. Ibid. c. 6.

Reeves' His. ii. 398.

Money, the medium of trade, was no less the object of concern than trade itself. The carrying of gold or silver

out of the realm was prohibited under pain of forfeiting the same; and importation of false money, which was at first punished only with forfeiture, was afterwards made high treason.

Stat. 9 Ed. 3. st. 1. c. 1. Stat. 25 Ed. 3. st. 5. c. 2.

Commencement of the poor-laws.

Stat. of Labourers, 23 Ed. 3. c. 1, et seq.

The first statute concerning the poor was passed in the 23d year of this king, in consequence of the number of labourers having been diminished by the plague, which led persons of this class, who survived, to set an exorbitant price upon their labour, and to prefer begging or starving rather than working for less wages. Wherefore it was found necessary to check this evil, by requiring persons of this description to serve on the terms that had been usual in the five or six years preceding. In case of refusal, they were, on conviction, to be imprisoned; and, if they absented themselves, they were to be branded with the letter F, for their falseness. The price of provision was also regulated at the same time, so that no person should sell things for more than what they fetched in the places adjoining, under pain of forfeiting to the injured party double the price. This Statute of Labourers was enlarged by several other provisions in the 25th, 34th, and 36th years of this king.

Law of landed property.

Stat. 1 Ed. 3. c. 12.

Among the matters of a private nature which engaged the attention of the legislature, that of tenures holds the first place. Tenants *in capite* were now permitted to alienate on the payment of a reasonable fine. By this enactment the king's tenants were relieved from the hardship of having their lands seized into the king's hands by way of forfeiture, according to the rigour of the old law, in case they aliened without licence. Before this statute, fines for alienation were permitted, as by the stat. *De Prærogativa Regis;* but in cases where parties omitted to purchase the licence, they were not relieved from the consequences of their neglect. From this time, forfeitures for alienation were altogether done away, and in their stead a fine was paid by the tenant as a matter of course, either before or after alienation.

Reeves' His. ii. 371.

It has been shown that by the old law a fine properly levied was binding on all parties who did not make their

claim within a year and a day, the object of which was to give peace and quiet to the possession of property. The wisdom of this law of non-claim was now evinced by the incessant litigations and other evil consequences which flowed from the experiment that was made in this reign to do away with it. In a subsequent reign, the old law was revived under certain modifications.

Stat. of Non-claim, 34 Ed. 3, c. 16. Co. 2 Inst. 518.

Uses. Stat. 50 Ed. 3. c. 6.

The possession of land by one man for the use of another, which in after times became a regular mode of conveyance, was now prohibited as a fraudulent practice, resorted to by people who borrowed money or merchandise on the strength of their lands and tenements, which they made over by collusion to their friends, and afterwards flying to the franchise of Westminster, St. Martin's-le-Grand, in London, or other privileged places there, lived on the profits of their tenements, and thus defrauded their creditors. As a remedy for this grievance, it was ordained by stat. 50th Ed. III. that should such gifts be found to be made by collusion, the creditors should have execution of the tenements and chattels as if no such gift had been made.

Denization of children. Stat. 25 Ed. 3. st. 2.

As the privileges of natural born subjects were by the common law very great, compared with those enjoyed by aliens, it was found necessary in this reign to define the law in regard to such as were born out of the realm: wherefore it was expressly ordained, in the 25th year of this king, that all children, inheritors, who should thenceforth be born out of the king's allegiance, if their fathers and mothers were at the time of their birth of the faith and allegiance of the king of England, should enjoy the same benefits as those born within the allegiance of England, provided their mothers passed the seas with the licence and wills of their husbands. At the same time it is observed that, by the law of England, the children of English kings, whether born within the kingdom or without, ought to have the inheritance after the death of their ancestors.

Administration of justice.

The parliamentary enactments respecting the administration of justice were numerous and important. Besides the

judicature of the council and parliament mentioned in the last chapter, the inferior courts were also the subject of several statutes.

Court of Exchequer.

The court of Exchequer continued to be an object of jealousy. The Commons frequently petitioned that judgments in that court might, if erroneous, be redressed and reversed in the King's Bench, and not before those who had given the judgment. At length, in the 21st year of this king, it was granted that such errors should be amended by the chancellor, treasurer, and two justices, which was afterwards confirmed by statute. The practice of suing upon suggestion without process in the Exchequer, was also complained of, as it had been in the case of the council; to which it was answered, that if any special complaint was made, the laws would provide a remedy. Many other petitions were presented by the Commons on the subject of the Exchequer, but without effect. As this court was the depository of records, it was ordained, by stat. 9 Ed. III. that justices of Assize, Gaol Delivery, and Oyer and Terminer, should send all their records and processes determined and put in execution to the Exchequer every year at Michaelmas.

Cott. Abrid. 21 Ed. 3. 26.
Stat. 31 Ed. 3. st. 1. c.12.
Cott. Abrid. 47 Ed. 3.

Cott. Abrid. 22. 29. 500.
Stat. 9 Ed. 3. st. 1. c. 5.

Court of the Steward and Marshal.

The jurisdiction of the court of the Steward and Marshal was, as before shown, of considerable magnitude; but, owing to the increasing importance of the courts of King's Bench and Common Pleas, and the jealousy of the Commons, it was now fast sinking into insignificance. At an early period of this reign it was enacted, that inquests were to be taken before men of the county, and not before men of the king's household, except in cases of covenants, &c. wherein those men were parties; and, if any one complained of error in this court, he was to have a writ to remove the record and process to the King's Bench; so that, as Mr. Reeves observes, the King's Bench was confirmed in that appellate jurisdiction which the court of the Steward and of the Marshal once possessed over other courts. Notwithstanding this statute was re-enacted in the tenth year of this king, the Commons still persisted in presenting numerous

Stat. 5 Ed. 3. c. 2.

Cott. Abrid. 25 Ed. 3. 34.

Reeves' His. ii. 420.

Stat. 10 Ed. 3. c. 2, 3.

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Cott. Abrid. 50 Ed. 3. 82.

petitions against the jurisdiction of the Steward and Marshal, as that none of the king's servants should implead any one in the Marshalsea; that the Steward and Marshal should hold plea of nothing but what was contained in the stat. *Art. sup. Chart.*; and that the limit of twelve miles might be reckoned from the king's presence, or from the place of the household, but not from both; also that the marshal might not intermeddle with that part of Southwark which was called guildable; and that it might be declared by statute what pleas the marshal should hold; with other petitions of the like kind; but no material alterations were made in the constitution or jurisdiction of this court besides those above mentioned.

Marshal of the King's Bench.

As to the King's Bench, we read for the first time of its having a marshal, whose office, like that of the marshal in the court of the Steward and Marshal, was to attach and keep in custody persons who were to answer in that court.

Stat. 5 Ed. 3. c. 8.

As this officer had taken upon him to let offenders loose upon bail, who had been indicted of felonies, robberies, and theft, it was found necessary to put an end to this practice by a statute, which enjoined upon the marshal to keep such prisoners in close custody, and not to let them wander abroad with bail or without, on pain of being imprisoned half a year, and ransomed at the king's will. It appears also from this statute that the marshal of the King's Bench might also act within the verge.

Commission of Nisi Prius.

Stat. of York, 12 Ed. 2.

Stat. 4 Ed. 3. c. 2.

Stat. 14 Ed. 3. c. 16.

The commission of Nisi Prius underwent some parliamentary alterations, which put it into the form in which it has ever since remained. By a statute in the last reign, the commission of Nisi Prius was granted only in cases where the demandant prayed the same; but now it was enacted, that such inquests should also be taken at the suit of the tenant in a plea of land. A Nisi Prius had heretofore been granted only before particular justices commissioned for that purpose; but it was now enacted that it should be granted before any justice of the King's Bench or Common Pleas, or the chief baron of the Exchequer, if he

were a man of the law, which it seems at this time he was not always. If any of them went into those parts, and if neither the justices nor the chief baron went, then it was to be granted before the justices assigned to take assizes in those parts, so that one of the justices assigned was a justice of the one bench or the other. It was moreover enacted, that a tenour of the record should be made, since called a Nisi Prius record, containing an entry of the declarations, pleading, and issue or issues, upon which the judge returned the verdict, making what, from the initial word in the return, has since been called a *postea*. It is doubtful whether any record was made out before this act, for the trial at Nisi; for while the cause was to be tried by a justice of the court where the issue was joined, a copy of the record was not necessary for the information of the judge, as it was afterwards, when a judge, who was a stranger to the cause, might be appointed.

Reeves' His. ii. 427.

A further improvement was made in the proceeding at Nisi Prius by a subsequent statute, which required that the names of all who were to pass on the inquest should be returned before the sessions of the justices at Nisi Prius, that the parties might have notice of the jurors, for their satisfaction. Henceforth the clause of Nisi Prius was omitted in the writ of *venire facias*, and inserted in the *distringas* or *habeas corpora*, as is the practice in the present day.

Stat. 42 Ed. 3. c. 11. Gilb. C. P. 74. Tidd's Prac. 819. Stat. 20 Ed. 3. c. 4.

The commission of the justices of Assize was likewise extended, authorizing them to inquire in their sessions of sheriffs, escheators, bailiffs of franchises, and their under-ministers; and also of maintainers, common embracers, and jurors in the country; and of the gifts, rewards, and other profits, which the said ministers do take of the people to execute their office.

The statutes of Edward I. in regard to justices of Oyer and Terminer, and of Gaol Delivery, were now confirmed, with additional provisions. A statute, in the second year of this king, complains that offenders had been greatly

Ante, p. 175. Stat. 2 Ed. 3. c. 2. Stat. 14 Ed. 3. c. 11.

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Stat. 34 Ed. 3. c. 1.

encouraged, because the justices of Gaol Delivery and of Oyer and Terminer, had been procured by great men, against the form of the 27th Ed. I. It therefore enacts, that such justices shall not be made against the form of said statute; and elsewhere that justices should be named by the court, and not by the party.

Co. Inst. 293. Hale's Hist. c. 8.

The increasing power which was thus given to justices of Assize, and the improvements continually made in their proceedings, superseded the necessity of the old justices in Eyre, whose commission was probably not revived after this reign, except for the purpose of hearing and determining pleas of the forest. Sir Matthew Hale observes, "After the 10th of Edward III., I do not find any justices *errant ad communia placita*, but only *ad placita forestæ*."

Justices of the peace. Stat. 34 Ed. 3.

Among the numerous provisions which were made in this reign for the preservation of the peace, the most important was that of appointing magistrates, at first called Keepers of the Peace, afterwards Justices of the Peace, with power to restrain offenders, rioters, and all other barrators, and to pursue, arrest, and chastise them according to their trespass and offence, and to cause them to be imprisoned and duly punished according to their discretion. These justices were to consist of one lord and three or four more of the most worthy in the county, who were to hold their sessions four times a year, which were afterwards known by the name of the Court of General Quarter Sessions. The jurisdiction given by the statute to these sessions extended to the trying and determining all felonies and trespasses whatsoever, with this restriction, that in cases of difficulty they were not to proceed to judgment but in the presence of one of the justices of either bench or of the assize.

Stat. 36 Ed. 3.

Court of quarter sessions.

We have seen that, in the reign of Henry III., the chief men of the county received the king's commands by the mouth of his justices to assist in the preservation of the peace, by causing offenders and suspicious persons to be arrested; but neither this indefinite commission, nor the commission of *trailbaston* in the reign of Edward I. which is supposed to

have been instituted for the express purpose of putting in force the provisions of the statute of Winchester, was found to answer the end so effectually, as the appointment of persons duly authorized to inflict immediate and suitable punishment. They had also authority to take sureties for the future good behaviour of the parties brought before them, a regulation which Mr. Reeves observes, is mentioned for the first time in this statute. It took the place of the pledges given in the decennaries, according to the Saxon institution, which had fallen into disuse.

Stat. 34 Ed. 3.

Reeves' His. Engl. Law, ii. 473.

Besides the appointment of these justices, various legislative provisions were made to render the administration of justice pure, impartial, and efficacious. An oath was administered to all justices, by which they bound themselves to do law and right, according to the usage of the realm. Sheriffs were not to hold their bailiwicks longer than a year; coroners were not to be chosen who had not sufficient land to answer the people. Indictments were regulated so as to prevent the abuses of sheriffs and other officers. Jurors were to be imprisoned if they were convicted of taking any thing of either party, and to forfeit ten times as much as they had received; besides that, the writ of attaint was made more efficacious against those who passed an unjust verdict. Added to all this, writs of protection and pardon were now considerably diminished, as they were found to defeat the ends of justice.

Stat. 18, 20. Ed. 3.

Sheriffs, coroners, and jurors, regulated.

A statute in the 25th year of this king, directed that such persons as had obtained protection should nevertheless answer the suits against them; but that execution of the judgment should be suspended until the king was paid, and then they might have an immediate execution.

Protections restricted.

Stat. 25 Ed. 3. st. 5. c. 19.

To prevent the too easy obtaining of pardons, which tended to the encouragement of offences, provisions were made by several statutes to limit the number of pardons, and prevent the abuse of this indulgence. Among other things, it was directed that in every charter of pardon granted on the suggestion of any one, the suggestion, and the name of

Pardons restricted.

Stat. 2. 10. and 14, Ed. 3.

Stat. 27 Ed. 3. st. 1. c. 2.

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him that made it, should be comprised in the charter; and should the suggestion prove to be untrue, the charter in that case was to be void.

Arrest for debt.

Stat. 25 Ed. 3. c. 17.

Co. 2 Inst. 394.

Reeves' His. ii. 439.

As to the remedies furnished by the statute for civil injuries, the most remarkable is that which, in the 25th year of this king, gave the process of capias and exigent in a writ of debt. Lord Coke supposes that, at common law, there could be no arrest of the body in case of debt, only in trespass, *vi et armis*; but Mr. Reeves is of a different opinion, which he grounds on the account given of process by Bracton. "We find," says this writer, "in the reign of Henry III. that the process in all personal actions was as follows: If the party did not appear on the summons, then he was attached by pledges, and afterwards by better pledges; if he still did not appear, the sheriff was commanded, *quod habeas corpus*, to take the body; if the sheriff returned *non inventus*, there issued a distringas *per terras et catalla*; after that, another distringas, commanding him also to take the body; after that, another distringas, *ne manum apponat*; and lastly, a writ to take the lands and chattels into the king's hands. Thus there might be one summons, two attachments, a capias (as it was afterwards called) and four distresses."

Still it may be doubted whether, in Bracton's time, when matters of simple debt and contract were not much accounted in law, it was a settled point that in all cases the same process to compel appearance was to be observed: but as these matters were now rising into importance, it became necessary to prescribe by statute the process which was to be resorted to in an action of debt and detinue, as had been already done in a writ of account by the statute of Marlebridge, 52 Henry III. c. 23. The only question here is, however, as regards injuries without force; for, in cases of injury accompanied with force, the law dealt with the defendant, in case he failed to appear after the first attachment, in the same manner as in criminal cases, that is, by capias and outlawry.

Delays in conducting a

For the prevention of delays in prosecuting a suit vouching

to warranty one that was dead, was prevented, by giving the demandant liberty to make his averment that the supposed warrantor was not alive. Many other regulations were made to diminish the number of dilatory pleas, or altogether to prevent them. One of the most important provisions of this nature was the statute of Jeofail, or Amendments, which directed that no process was to be annulled or discontinued by any mistakes in names, syllables, and letters, by the misprision of the clerks; but that as soon as the mistake was perceived, it was to be amended by the challenge of the party, who acknowledged his error by the words *jeo faile*, or *jai faillé*, I have made a mistake and prayed amendment. This is the first of those parliamentary enactments on this subject, which, from the words above mentioned, have since derived the name of statutes of Jeofail, or Amendments.

suit prevented. Stat. 14 Ed. 3. c. 1. Stat. 25 Ed. 3. st. 5. c. 11. Stat. 14 Ed. 3. st. 1. c. 6.

Statute of jeofail.

Another regulation was also made in the same year of this king on the subject of pleading, requiring that all pleas should be pleaded in English rather than in French, a language which, owing to the encouragement first given to it by the Conqueror, and afterwards to the close intercourse subsisting between the two countries, crept into use, and was ever after this time necessarily retained on account of its fitness for the purpose. But the French was not at any time employed in all law proceedings. Some of the Conqueror's laws are in Norman French; but those which were made during his reign in England were in Latin, as were also all writs, charters, and public instruments. The same remark applies to all public documents in succeeding reigns until the time of Edward I. Indeed, so prevalent was the use of the Latin, owing to the active part the clergy took in judicial proceedings, that the treatises of Glanville and Bracton, as well as others in the reign of Henry II. and Henry III. were composed in that language. The *Statutum Scaccarii* was the first statute in French, after which Latin and French appear to have been used indiscriminately, as suited the convenience of the parties; but the use of the French became by degrees the

Pleadings in English. Stat. 25 Ed. 3. st. 5. c.15.

Wilk. LL. Anglo-Sax.

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most prevalent. The law treatises of Britton and others, in the reign of Edward I. were written in French, as also the Mirror, in that of Edward II. In the reign of Edward III. the petitions and proceedings in parliament were in French, which, notwithstanding this statute, continued to prevail for some time.

Ante, p.
Stat. 1 Ed. 3. st. 1. c. 4.

The trial by duel, which we have seen in the time of Glanville was allowed in a question on a false judgment from an inferior court, was now abolished by statute. When a record came into the king's court by a writ of false judgment, if the party suggested that the record was otherwise than the court alleged it to be, then the averment was to be received *de bonne pais*.

Jury de medietate linguæ.
Stat. 28 Ed. 3.

By the statute of the Staple, the privilege was granted in favour of foreign merchants, to have an inquest mixed of natives and foreigners, where one of the parties was of this country and one of another. This privilege was now extended to criminal cases, where one half of the jury was to be denizens and the other half aliens. This mode of trial, *per medietatem linguæ*, was not a novelty in our law, for a similar practice existed among the Saxons, *viris duodeni jure consulti, Angliæ sex, Walliæ totidem Anglis et Wallis jus dicunto.*

Lambard, Arch. 91.

CHAPTER XIX.

EDWARD III.

State of the Common Law.—Descents.—Bastard Eigné; Mulier puisne.—Limitations and Remainders.—Devises.—Warranty.—Ousters of Freehold.—Congeable Entry, &c.—Chattels.—Assizes.—Writs of Entry.—Action of Debt.—Action of Detinue pro rationabili Parte.—Action of Covenant.—Action of Trespass, or Action on the Case.—Replevin.—Proceeding by Bill.—Actions Popular, Suggestion, or Information.—Pleading.—Secta and Law-Wager.—Trial by Proofs.—Trial by the Certificate of the Bishop.—Trial per Pais, or by Jury.—Challenges.

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BESIDES the additions and alterations made in the law by statute, as stated in the preceding chapter, the Common Law also underwent some changes from the decisions of courts.

State of the common law. Descents.

The principle of descent was somewhat altered now in favour of bastards, in cases where the parents afterwards intermarried. A child born out of wedlock, where marriage afterwards ensued, was called a bastard *eigné*, in distinction from the one born in wedlock of the same parents, who was called *mulier puisne*, *mulieratus* being the term applied by Glanville, and other old writers, to legitimate children.

Bastard eigné; mulier puisne. 31 Ass. 22. 49.

According to the law as regarded these children, if a person died seised in fee, leaving issue a bastard *eigné* and a *mulier puisne*, and the bastard entered and died seised, the *mulier* was to be precluded from entering on the issue. But if the descent happened while the *mulier* was within age, it was held that he was not to be barred his entry.

The privilege of the bastard only availed his issue against the *mulier* and his issue; but not against a stranger nor

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against the issue of the *mulier*, if they claimed under an entail. Thus, where land was given in tail, with a remainder over in tail, and the first tenant in tail had issue a bastard and a *mulier*, and died seised; the bastard entered and died seised, leaving issue; the issue entered, and the *mulier* died without issue; it was held the second remainder-man should have a formedon, not being bound by the descent on the issue of the bastard.

Reeves' His. Engl. Law, iii. 3. 39 Ed. 3. 38.

There was, however, one point of law in this reign, regarding the legitimacy of children, which was more in accordance with the law as laid down by Glanville, than with that stated by Bracton; namely, that questions of legitimacy were decided in the ecclesiastical courts by the rule of the civil laws, *filius hæres est quem nuptiæ demonstrant*. It seems that the common law, in the time of Bracton, admitted a restriction to this rule, for although marriage was a presumption of legitimacy, yet he expressly lays it down that proofs might be admitted to the contrary, and states some circumstances that would be a violent presumption against the legitimacy of the children; as the absence of the husband, impotency, and the like. In this reign, the rule of law given by Glanville is strictly adhered to; for where a man left his wife *enceint*, the issue was not to be taken that she was not *enceint* by her husband on the day of his death, for *filiatio non potest probari;* but the issue was to be, that she was not *enceint* on the day of his death. So says the Mirror, "the common law only taketh him to be a son whom the marriage proveth to be so." Such was held to be the law for several centuries, although this rule has since admitted of exceptions, in conformity with the law in Bracton's time.

Glanv. l. 7. c. 12. Bract. 63.

41 Ed. 3.

Mir. de Jus. p. 70.

Limitations and remainders.

The doctrine of limitations and remainders were, in consequence of the statute *De Donis*, very nicely discussed in this day, and many of the principles of law in regard to landed property were recognised which have since obtained. A practice appears to have commenced in this reign, of limiting an estate to the life of a man, remainder over to his right

Reeves' His. Engl. Law, iii. 7.

heirs; the object of which, probably, was to get rid of the feudal burdens of wardships, marriage, and relief; but the decisions of the court defeated this object: for where an estate was given to the father for life, remainder to the first son and his wife in tail, remainder to the right heirs of the father, the father died, and then the eldest son and his wife died without issue, then the lord was permitted to avow upon the younger son for the relief, as heir of his elder brother, to the remainder in fee, notwithstanding the younger son contended that he came in as a purchaser, under the words "right heirs of his father," and that the tail and the fee could not be *simul et semel* in the elder brother.

40 Ed. 3. 9.

The liberty of devising lands by testament had been hitherto confined to particular boroughs and places according to certain customs; but we read of many cases in this reign upon wills of land, which appear to have been governed by the same rules as were afterwards established into law. Thus it was held, as a settled rule in law, that a husband might give lands to his wife by will; but a wife was not allowed to devise lands to her husband, although she might, as in former times, with the consent of her husband, devise the moiety of his goods. Sometimes lands were devised to executors, to make distribution for the good of the testator's soul, and, if the executors failed in so doing, the heir might enter, and have an assize.

Devises. Reeves' His. iii. 9.

44 Ed. 3. 33. Bro. Desc. 34.

38 Ass. 3. 39 Ass. 17, et passim.

A scrupulous regard was shown to the will of the testator, and more indulgence in the construction of testaments than in that of deeds. When a remainder was limited *propinquioribus hæredibus de sanguine puerorum* of the devisor, it was held that, upon the devisor dying, leaving two sons, who died without issue, and a daughter, who had issue Isabel, and then died; that Isabel should take, being sufficiently described by the will.

Reeves' His. iii. 10.

30 Ass. 17.

The force of warranty was shown in some cases now that had not before occurred. If the uncle or other ancestor, or cousin collateral, who was not privy to the entail, aliened with warranty, and died without heirs, so that the next issue

Warranty. O.N.B. 143.

Reeves' His iii 11.

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in tail was become his right heir, such issue would be barred by his ancestor's deed with warranty. This was afterwards termed collateral warranty, to distinguish it from the usual sort of warranty called lineal: not that the terms lineal and collateral had respect to the heir, whether lineal or collateral, but to the title which he had. If the heir, whether lineal or collateral, might by any possibility claim the land from him that made the warranty, then it was termed lineal; but, if the ancestor by whom the warranty was made had no right to the land, the warranty was collateral to the title by which the estate was claimed.

Co. 1 Inst. 370.

There was one sort of warranty, however, since called warranty, commencing by disseisin, which was considered as no bar; as, when a guardian or tenant at will aliened the land of the heir or the lessor with warranty, such alienation being equivalent to a disseisin, the warranty was void as against the heir or lessor.

43 Ed. 3. 7.

Reeves' His. iii. 13.

Ouster of freehold, abatement, congeable, entry, &c.

In regard to the dispossessing a person of his lands and tenements, and the consequences resulting therefrom, many points of law began now to be discussed, and many terms came into use, which have since become familiar to the modern lawyer, such as ouster of freehold, abatement, congeable entry, descent that tolls entry, discontinuance, remitter, and others of which an explanation will be given hereafter.

Real actions.

All the real actions, before partially mentioned, or alluded to, were now described, with all their properties and incidents, and in the terms which have been retained to the present day. The remedy, by the assize, had undergone some change to accommodate it to the state of the law as regarded jurors. The practice of turning assizes into juries, which had been resorted to, probably to relieve recognitors, from their liability to an attaint, to which jurors were not then subject, appears to have ceased, being no longer available for that purpose, as all jurors had, by statute, been made equally liable to attaints. Juries had, however, now become more circumspect, for, instead of giving verdicts, which comprehended both the law and the fact, they would

Ante, p.157.

Stat. West. 1. c. 38.

give special verdicts, or verdicts at large, as they were afterwards called, that is, they would state the special circumstances, and pray the justices to form their own conclusion on the point of law, as in the assize of Novel Disseisin, whether from the circumstances so stated, it was disseisin or not. Hence arose the distinction, now made, as to the manner of taking the assize. An assize was said to be taken in the point of assize, when the recognitors tried the general issue *nul tort, nul disseisin.* An assize was said to be taken, at large, when the title and all the circumstances were sent to be tried by the recognitors, examples of which are numerous throughout the book of assizes. An assize might also be taken, out of the point of assize, where the tenant pleaded some special matter in bar, showing why the assize should not pass as a release, or some foreign fact to be tried in some other county. Sometimes an assize was taken to inquire of the damages only. To these different kinds of assizes may be added, the assize of Fresh Force, so called, because the entry of the plaint, and the recovery thereon, was to be within sixty days, or the plaintiff would be barred of this remedy, and driven to an assize at common law. This assize lay, where a man was disseised of tenements, devisable, as they were, by the custom of London.

Litt. Sect. 366.

Reeves' His. iii. 23.

8 Ass. 28. 10 Ass. 1. 28 Ass. 17. 49 Ed. 3. 18.

Cowel's Inter. ad Voc.

25 Ass. 3. Cowel's Inter. ad Voc.

Writs of entry.

To the writs of entry, already mentioned, may be added, some others, which had been varied since Bracton's time, so as to meet particular cases. A writ, *cui ante divortium*, now lay for a woman instead of the *cui in vita*, where a divorce took place between her and her husband, after the alienation. A writ, *causa matrimonii prælocuti*, lay for a woman, who had given lands to a man, as it were *in maritagium*, with intent that he should marry her, and he did not. In two cases, namely, lunacy and infancy, where the parties were disabled, in law, to make a gift, a writ was furnished for the recovery of the land. In Bracton's time, when a gift was alleged to be made by one *non compos mentis*, a writ was framed, to inquire whether the donor was of sound mind: instead of this proceeding, a writ of

O.N.B 134. Ante, p.150

O.N.B. 155.

Bract. 14.

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entry, called *dum non compos mentis*, now lay for the heir of the person who was of unsound mind, and not, as has been supposed, for the party himself, who made the alienation; for it is generally held, that a person is not admitted to stultify himself. Where an infant aliened land, that had descended to him during his infancy, or which he had purchased to himself, he might, when of full age, recover, by the writ *dum fuit infra ætatem*. When a tenant, for term of life, by the curtesy, or in dower, aliened in fee and died, the reversioner might have the writ *ad communem legem*. The writ *quod ei deforceat*, lay for a reversioner, after an estate for life. The writ *super disseisinam in le quo*, or *in le quibus*, lay for the heir of a person who was disseised and died, against the disseisor. This writ approached the nearest to the assize of Novel Disseisin, and was so called, because it always contained the words "de quo, or de quibus, A. disseisivit B. patrem," &c.

Reeves' His. iii. 32.

O.N.B.125.

Bract. 323. Ibid. 218.

Reeves' His. ii. 33.

Chattels.

Spelm. Gloss. Du Cange, Gloss. ad Voc. Spelm. Gloss. Cowel's Interp. ad Voc. Grand Cout. l. 4. c. 1.

Although the law of real property still occupied the principal attention of the courts, in this day, yet we find, that a distinction began to be made on the subject of personal property. All possessions were comprehended by Bracton, after the manner of the civil law, into *bona*, which were distinguished into *mobilia*, and *immobilia*; but now the term chattels, in French *chattels*, low Latin *catalla*, was come into use to denote, not only cattle, but all goods moveable and immovable, except such as were of the nature of freehold. They were, likewise, distinguished into chattels real, such as a lease for years, and chattels personal, as a bow, a house, &c.

31 Ass. 6. 38 Ass. 49.

Action of debt.

Reeves' His. iii. 62. Ante, p.203.

As personal actions were now coming more and more into use, a greater attention was paid to this part of the law, which has survived the changes of the times, and been handed down to the present period. It has already been shown, that an action of debt might be brought, either in the *debet*, or the *detinet*, namely, in the *debet* for money, and in the *detinet* for chattels. It was now laid down as a rule, in law, that an action, brought by or against executors,

was to be sued in the *detinet* only. In regard to deeds, on which an action of debt was commonly grounded, the law before this reign was, that a deed, made in a place not within the jurisdiction of the court, could not be the subject of an action, wherefore, as a remedy for this inconvenience, the stat. 9 Ed. III. ordained, that when a deed was pleaded in bar of an action, bearing date in a place within a franchise, and the deed was denied, the witnesses were to be summoned, and if they did not appear, the inquest was to be held in the county where the plea was moved, in the same manner as if the deed had been made in the county; but, as this didnot apply to places in foreign countries, an expedient was hit upon of naming foreign places as if situated in England; as, for example, supposing a deed, made at Harfleet in Normandy, to be named as if made at Harfleet in Kent. Although it was pleaded there was no such place in Kent, the objection appears to have been overruled.

48 Ed. 3. 2.

Action of detinue pro rationabili parte.

Notwithstanding the decisions of the courts in the former reign, in favour of a man's power of bequeathing his personal effects away from his wife and children, actions of detinue *pro rationabili parte* were frequently brought in this reign. But the court confirmed the opinion then advanced. In one case an action was brought by the children to have a reasonable part of their father's goods, when Thorpe, one of the justices, said, "How can we give judgment, when you have brought an action that is contrary to law?" and Mowbray, another justice, said, the Lords in parliament would never grant, that this action should be maintainable by any common custom of the realm. From this it is clear that, owing to the particular custom of certain places, by which a man's power of bequeathing his goods was restricted, and also, owing to the very prevalent practice of leaving the *rationabiles partes* to the wife and children, though not required by any positive law to that effect, much uncertainty prevailed, on this subject, in the minds of people, although the courts had uniformly held but one doctrine.

40 Ed. 3. 38.

Reeves' His. iii. 70.

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Action of covenant. Ante, p. 205. Nov. Narrat. 44. Bract. 220. *Quare ejecit infra terminum.* Reeves' His. iii 8. 38 Ed. 3. 24. 47 Ed. 3. 24.

As the writ of covenant lay for the recovery of land, or any thing issuing out of land, as also of moveables, it might be, either a real action, a personal action, or a mixed action, that is, an action for the recovery of the land, or for the recovery of damages only, or of both. Fines were commonly levied on actions of covenant, wherefore, the declaration, in such cases, ran thus, "à tort ne lui tient fine fait," &c. Before the time of Bracton it appears, that the *breve de conventione* was the only remedy for termors, who had been ejected from their term, but as this lay only between the lessor and lessee, who alone were parties to, and bound by the covenant, a less tedious action called *quare ejecit infra terminum* was framed, for the benefit of a termor, against all persons who ejected him. It was a question, in this day, whether a term should be recovered in covenant; but the better opinion was, that where a lessor ousted his lessee, he might recover both his term and damages.

De ejectione firmæ. O.N.B. 122. Reeves' His. iii. 29.

A new remedy for termors was now coming into use, called a writ *de ejectione firmæ*, or a writ of ejectment, as it was afterwards called. As this writ at first lay only for damages, it was not so much considered, as it was when it went to the recovery of the term. This was in the nature of an action of trespass.

Action of trespass. *Action on the case.* 22 Ass. 41.

The action of trespass was now resorted to, where it appears never to have been before used; and by varying the form of the writ, so as to suit it to every man's case, according to the stat. Westm. 2, which authorized the framing writs *in consimili casu*; the writ of trespass or action on the case, was now become a remedy for every injury done to the person or the property. The first action of trespass *sur son case* mentioned, is to be found in the 22d year of this king, when an action was brought against a man, for that he had undertaken to carry the plaintiff's horse in his boat over the Humber, but that he overloaded his boat with other horses, by which overloading the plaintiff's horse perished, *à tort et damages*.

It was objected to this writ, that it supposed no tort in the defendant; but, on the other hand, proved, that the plaintiff should rather have had a writ of covenant; but it was said, by one of the judges, that the defendant committed, as it should seem, a trespass in overloading his boat, by which the plaintiff's horse perished, and that the action would lie.

"Thus," observes Mr. Reeves, "was the notion of trespass, or *malfaisance*, extended to a number of other cases, which were but remotely allied to it." But it does not appear to have been determined, in this reign, when the proper remedy was a general writ of trespass, and when a special writ, nor when a special writ should be laid *vi et armis*, and when not. The principal reason for inserting the *vi et armis* was, that the plaintiff thereby became entitled to process of *capias*, and the defendant could not wage his law.

Reeves' His. Engl. Law, iii. 89.

The law of replevin was now put on the footing on which it has, with very few alterations, remained ever since. Replevin was so called from *replegiare*, or *re* and *plegiare*, to deliver back upon pledges, the principal word in the writ, issued in Glanville's time to the sheriff, directing him, *replegiare facias*, to make deliverance of the cattle which had been taken in distress. The unjust taking or detaining cattle against gage and pledges, was called, by Bracton, in the language of the old law, *vetitum namium*, that is, a forbidden, or unlawful taking, and is classed by him among the *placita coronæ*. When any one complained that his cattle had been unlawfully taken or detained, he might either have the writ above mentioned, or, for the sake of expedition, he was allowed, by the statute of Marlebridge, to make a verbal complaint to the sheriff, and on giving him pledges *de prosequendo*, he or his officer would proceed to the place where the cattle were detained. If obstructed in the execution of his duty, he was armed with authority to raise the *posse comitatus*, and to put the offender into prison, which, in those days of lawless violence, was frequently

Replevin.

Ante, p. 112.

Ante, p. 152.

Stat. Marl. 52 Hen. 3. c. 21.

Bract. 157. Flet. l. 2. c. 37.

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necessary. If he could not find the cattle, and it appeared that they were, as it was now termed, *elongata*, eloigned, or removed, there issued a process to take the distrainer's cattle to double the value, which was now called a *capias in withernam*, that is, a taking by way of reprisal; if this process failed there issued a *capias* against the person of the distrainer.

43 Ed. 3. 26. Bract. ubi supra.

If no opposition was offered to the sheriff, and the goods were delivered to the complainant, then a day was given to the parties to appear in court, when the defendant might make avowry, as it is now termed, that is, avow or justify, taking the distress in his own right, or if, as a bailiff, he justified in another's right, he was said to make cognizance, that is, to acknowledge the taking, but to insist that it was legal, as he acted by the command of one who had right to distrain. The defendant might also say, that the taking was just, because he found the beasts on his land *in suo damno*, or *damage feasant*, as it was now called.

2 Ed. 2, et passim.

Bract. 158.

Mayn. 17.

Action of replevin.

Bract. 516.

If, in this action, which had now acquired the appellation of an action of replevin, the cause was determined for the plaintiff, namely, that the distress was wrongfully taken, then the judgment was, that he should retain possession of his goods, and moreover recover damages; but, if by the default or nonsuit of the plaintiff, it was determined for the defendant, then the judgment was, that the cattle should be returned to the lord, for which a writ issued, grounded on the statute of Westminster, called a writ *de retorno habendo*. But notwithstanding this judgment, the plaintiff might, at common law, have had as many replevins as he would until the abovenamed statute, which restrained him from having any replevin after nonsuit, but gave him a writ called *breve de judicio*, or a writ of second deliverance.

Ibid. 8 Ed. 3. 72. Stat. West. 2. 13 Ed. 1. c. 2.

Co. 2 Inst. 340.

10 Ed. 2. Mayn. 302.

If the plaintiff was a second time nonsuit, or the defendant had judgment upon verdict or demurrer, in the first replevin, then a return, irreplevisable, was to be awarded, and no new replevin granted. Besides, before this statute, the plaintiff, after replevying his cattle, might sell or eloign

5 Ed. 2. Mayn. 164. Co. 2 Inst. 340.

them, so as to prevent their return to the defendant, if the judgment of the court was in his favour, to remedy which evil, provision was made, that the sheriff, before he made delivery of the cattle or goods, should take, not only pledges *de prosequendo*, but also pledges *de averiis retornandis* if a return should be adjudged.

Sometimes it would happen that the defendant claimed a property in the goods taken in distress, in that case, the party replevying might sue out a writ *de proprietate probanda*, directing the sheriff to try, by an inquest, in whom the property subsisted, if it were found for the plaintiff, then he was to make deliverance, but if for the defendant, then the sheriff could proceed no further, but the claim of property was to be determined in the higher court.

Bract. 155. 156.

As pleas of *vetitum namium*, respected the king's crown and dignity, they were, in Bracton's time, properly determinable, only in the courts at Westminster, and did not fall under the jurisdiction of the sheriff; but for the sake of despatch a special jurisdiction was, in some cases, given to the sheriff, who in that instance acted, not in his office as sheriff, but as *justiciarius regis*. By virtue of this commission he might compel the parties to appear in the county court, and determine all matters between them, until a right of freehold came in question, when the sheriff could proceed no further. When the action of replevin became the usual remedy for civil injuries, and all causes of that kind involved, more or less, the question of right of freehold, it was found most convenient to remove the plea, in the first instance, to the superior courts, and of course this partial jurisdiction of the sheriff fell away of itself.

Writ de homine replegiando. O.N.B. 40.

A writ of replevin lay, not only in cases of distress, but also where a man was imprisoned, who might by law be bailed, he might have a writ *de homine replegiando*.

Proceedings in a suit.

Since the introduction of writs, it had become a maxim in law, that no suit should be commenced in the king's courts without a writ, but this was to be understood only in reference to ordinary cases. There were other modes of pro-

ceeding, of more ancient date than that by writ, which were more adapted to the extraordinary jurisdiction, exercised by our kings at an early period, in the administration of justice.

Proceeding by bill.

One of these proceedings was by bill, of which there is frequent mention in this reign, in the courts of King's Bench, Exchequer, and Common Pleas. Although but little is said of the nature of this proceeding, we may gather that it was a sort of plaint, or *queritur*, made personally in court, and was particularly applicable to officers of the court, attornies, and such persons as, being supposed to be always there attendant, were thus privileged from arrest by the common process: whence the proceeding in such cases acquired the name of a Bill of Privilege. In cases of contempt, and in all matters that touched the king, the proceeding by bill appears to have been the usual mode. Sometimes it was alleged to be *tam pro domino quam pro seipso*, as in the case of a plaintiff in the King's Bench, who, while bringing a writing there to prove his case, was attached by the defendant. Actions of this kind, brought for the king as well as the party, were afterwards called *qui tam* actions, or popular actions.

Bro. Abr. Bille. 29. 3 Comm. 289. Co. 2 Inst. 23. 4 Inst. 72.

30 Ass. 14.

Reeves' His. iii. 94.

Suggestion.

Another mode of proceeding, which was also in the nature of a verbal application, or complaint, was by suggestion or surmise, which, as we have before seen, excited the jealousy of the Commons, in regard to the council and the Exchequer. This proceeding in the King's Bench does not appear to have been resorted to, in common cases, so as to awaken any particular observation; and, in matters affecting the king, suggestions were admitted without dispute, and were afterwards established under the name of informations.

Pleading.

Pleading was carried on much in the same manner as in the preceding reign, unless, as has been asserted, it had become the practice to put the pleadings in writing. If this practice had now really commenced, which is inferred from the specimens of declarations in the *Novæ Narrationes*, it had not as yet destroyed the simplicity of pleading, nor introduced that subtlety and refinement which was affected

Gill. Orig. of K. B. Reeves' His. Engl. Law, iii. 95.

by pleaders in after times. Lord Coke observes, that "in the reign of Edward III. pleadings grew to perfection, both without lameness and curiosity." Sir Matthew Hale confirms this opinion by observing, that "pleadings, in this reign, were somewhat more polished than in the reign of Edward I.; yet they had neither uncertainty, prolixity, nor obscurity.

1 Inst. 304. Hale's Hist. Com. Law, c. 8.

Secta.

The practice of producing and examining the *secta*, or witnesses of the plaintiff, which, as before observed, is supposed to have been grounded on Magna Charta, appears to have virtually ceased in this reign, and was probably never universally resorted to. In the preceding reign it was demanded, on the part of the defendant, that the *secta* should be examined, but the counsel for the plaintiff objected, on the ground that the court of Common Pleas never suffered a *secta* to be examined. However, he said he was ready to aver, that is, to prove by the verdict of a jury. Probably, in proportion as the trial by jury came into use, the production of the *secta* fell away. In this reign there is no mention of the *secta*, except in the formal conclusions of the declarations with the words "inde producit sectam," a form which has continued in English to the present day.

Ante, p. 141.

7 Ed. 2. Mayn. 242. Reeves' His. ii. 332.

Law-wager.

Law-wager, now commonly called *Ley Gager*, or *Gager de Ley*, was in frequent use at this period, and caused some discussion in the courts, as to when it should and should not be allowed. A defendant might wage his law in simple debt and arrears of accounts, and also in debt on a tally, as had heretofore been the usage; but, as the concerns of men began to be more enlarged and multiplied, the inconvenience of trusting to the oath of needy persons was more sensibly felt, and, accordingly, in the former reign, it was granted *ex gratia principis*, as we are informed, that in cities and fairs, and in causes between merchants, the party affirming might prove his tally *per testes et patriam*. Law-wager was not now, nor probably ever had been, allowed against an obligation, on which an action of debt was founded, and it

40 Ed. 3. 40. 41 Ed. 3. 2. Mayn. 351. Ante, p. 204.

Flet. 138.

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appears also, that it was not allowed in a debt for rent, because it was connected with the realty. Upon the same ground it was not allowed, in detinue, for charters in the preceding reign, but the courts were not settled on this point at the period we are now treating of. It was, however, according to the old law, allowed in non-summons, and other collateral points connected with land and obligations. No defendant could wage his law against the king, and for this reason, it was not allowed in an attachment upon a prohibition, this being considered in the light of a contempt. Such at least was the final decision, but it was determined otherwise in some cases.

29 Ed. 3. 44. 50 Ed. 3. 16. Reeves' His. iii. 99. Mayn. 78. Ante, p. 119. 50 Ed. 3. 18 Ed. 3. Ed. 3. 32. 44.

Trial by proofs. Ante, c. 9.

The trial *per pruves*, by proofs, so often mentioned by Glanville and Bracton, was not entirely disused in this reign; but it appears to have been resorted to, only in cases where, by construction of law, the matter could not come within the knowledge of the *pais* or country: thus, in an assize, brought by a woman *quæ fuit uxor* B. the tenant said, that B. was in another country, and he was ready to prove it, that is, to put it on the trial by proofs. To this it was answered, on the other side, that this amounted to the issue of *couvert baron*, which was triable by the assize, therefore they prayed that the assize might pass, but it was the opinion of the court, that this point had formerly been tried by proof, and so it must continue.

36 Ass. 5. 39 Ass. 9.

Trial by the certificate of the bishop. Reeves' His. iii. 99. 39 Ed. 3. 39.

As to the trial, by certificate of the bishop, it was employed when the issues of *feme couvert*, or not *feme couvert sole parson*, or not *sole parson*, born before espousals, or after, &c. were to be tried; but the courts lent a willing ear to any plea, however subtle, which seemed to justify them in not applying to the bishop. In an assize by *baron* and *feme*, it was alleged, by the tenant, that there had been a divorce between the plaintiffs, and one of them had since been married to the tenant, therefore she was the wife of the tenant and not of the demandant. It was held, after much debate and argument, that this should be tried by the *pais*, and not by certificate, on account of the conclusion of the plea *et issent*

nient son feme, for, if he had rested only on the divorce, this being a purely spiritual question, must have gone to the spiritual tribunal, but the conclusion being a matter in *pais*, brought the whole before the country. So, in like manner, where the issue in a *quare impedit* was void, or not void, this was to be tried by the country; but if it had been full or not full, then, by certificate; for plenarty was to be tried by the Court Christian. Where the issue was whether the maker of a deed was professed on the day he made it, it was tried by the country, for although profession was a matter properly to be tried by the certificate of the ordinary, yet, as the profession was here admitted, the doubt was only as to the time the deed was made. So, likewise, the courts would sometimes try, by the country, the direct questions of profession, general bastardy and the like, if alleged in a person who was dead or a stranger to the action: which innovation was justified on the ground of despatch.

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40 Ed. 3. 20.

44 Ass. 10. 38 Ass. 30. 41 Ed. 3. 37.

As the trial *per pais*, or by jury, had thus gained ground on the old modes, all the circumstances and forms, belonging to this manner of determining questions, were now more minutely examined than ever, and alterations were made with the view of rendering it more efficient.

Trial per pais, or by jury.

The circumstance of jurors being of the vicinity where the fact to be tried happened, was an indispensable qualification in the time of Bracton, it being presumed, that the jurors decided from a personal knowledge of the parties and transactions; but as neighbourhoods became more fluctuating, and men lived less under the observation of each other, a difficulty naturally presented itself of finding twelve freeholders in a hundred, who could take upon them to say, that they were either eye or ear witnesses of the matter on which they were to decide. Besides, an inconvenience obviously arose, from choosing jurors out of the neighbourhood, that they were apt to be prejudiced and partial. The experience of these objections naturally led the courts to relinquish the practice by degrees. In the reign of this king, it was thought sufficient if four were of the hundred.

Ante, p. 151.

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Venue.

One consequence of this change was, that questions now arose respecting the *vicinage*, *visne*, or *venue*, as it was afterwards called, whence the jury should be summoned. Whilst the law required, that the jury, summoned to try any issue, should be acquainted personally with the merits of the case, the trial of all matters was necessarily confined to the neighbourhood where the injury really happened; but when this rule was departed from, plaintiffs might either declare the injury to have happened in what county they pleased, or might mention several counties as the scenes of different parts of the same transaction. The courts, therefore, were now called upon to determine from what county the *venire facias* should be awarded. In doing this they appear to have been guided by no rule, but to have determined every case on its own merits. In questions of villenage, where the issue was, that the demandant was a *villein regardant* to the manor of N. in one county, and the birth was laid in another county, they sometimes awarded the *venue* according to the old law, where the villenage was alleged, and sometimes where the birth was laid. In other cases the *venue* was awarded where the fact happened, and sometimes where the land lay which was the matter in question, probably according as it appeared to the court that the cause could best be tried in this or that place. In after times, when this point of law was more defined, actions were distinguished into local, when they were obliged to be brought in the county where the cause of action arose; and transitory, when they might be brought in any other county.

Reeves' His. iii. 108. 39 Ed. 3. 36. 40 Ed. 3. 36. 43 Ed. 3. 4. 44 Ed. 3. 6. Co. Inst. 125.

Challenges.

The taking exceptions to jurors was now called challenging, in Latin *calumnia*, in the improper sense of making a charge. To challenge, probably derived from *call*, signifies here as much as to call, or single out a person, by way of objection to him. Challenges were either to the array, that is, to all the jurors, or the whole panel or little square of parchment in which the names of the persons were arranged in order, or to the poll *in capita*, that was, to the head or person of any particular juror. Challenges were made on

38 Ed. 3. 25. 41 Ed. 3. 9. 49 Ed. 3. 1.

various grounds; as, if a juror was nominated by either party, if the sheriff was *de robes*, as it was called, to either party, or a relation even in the eleventh degree, or held leases or lands under either party, and numberless other reasons of a similar nature.

21 Ed. 3. 43.

In all cases, where there were not sufficient of the jury returned after defaults or challenges, the plaintiff might pray a *tales*, as it was then and since called, to the number of ten, but no further, except in an attaint, when eighteen *tales* were allowed to make up the twenty-four.

LL. Hen. 1. c. 31. Flet. 230. Hale's P. C. ii. 297. Hist. Com. Law. 349. Runnington's edit.

The practice of afforcing the assize was now entirely done away. It had begun to decline in the reign of Ed. I., when, in order to compel the assize to be unanimous, the sheriff was directed to keep the jurors without meat or drink, until they agreed on their verdict. By a law of Henry I., which prevailed for some time, judgment was given *ex dicto majoris partis juratorum*, in the same manner as in the case of coroners' inquests. In this reign more vigorous means were resorted to, to compel unanimity; for the jurors, who dissented from the rest, were committed to prison, and if the under-sheriff, having charge of the jurors, suffered them to eat or drink, or to go at large, a *capias ad respondendum* was awarded against him out of the King's Bench, and the verdict was void. In like manner, the verdict of the greater part was no longer allowed, for it was held, that the verdict of eleven was no verdict. Justices were also required to carry jurors about with them in carts until they were agreed: whence arose the practice of carrying juries that could not agree in their verdict, to the bounds of the county. If the jurors, after they had retired to consider their verdict, ate, or drank, or went at large, the verdict was void, and the party might have a new *venire facias*, which was, in fact, granting a new trial, a practice that afterwards became general, whenever the court, on being applied to by either party for that purpose, thought proper to set aside the verdict.

24 Ed. 3. 24.

41 Ass. 11. 4 Ed. 3. 24.

CHAPTER XX.

EDWARD III.

State of the Criminal Law.—Treason.—Statute of Treason.—Petty Treason.—Homicide.—Chance Medley.—Murdrum.—Arson.—Theft.—Burglary.—Larceny.—Rape.—Mayhem.—Striking a Clerk.—Striking in Courts.—Usury.—Forestalling.—Felony.—Punishments.—Felo-de-se.—Breaking Prison.—Striking in the King's Palace or Courts, punished with the Loss of the Right Hand.—Standing Mute.—Peine forte et dure.—Perjury.—Conspiracy.—Spreading false Reports.—Accessories—Modes of Prosecution.—Appeals.—Indictments.—Outlawry.—Prisoners not to be ironed.—Benefit of Clergy.—Pleas of autrefois Acquit and autrefois Attaint.—Judgment and Execution.—Privileges of married Women.—Sources of legal Information.—Statutes.—Parliament Rolls.—Year-Books and Assizes.—Law Tracts.—Old Tenures.—Old Natura Brevium.—Novæ Narrationes.—Inns of Court.—Salaries of Judges.

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State of the criminal law.

THE last important subject of consideration in this reign is the state of the Criminal Law, of which a general view will here be taken. The principles of the criminal law had not materially changed from those which appear to have prevailed in the time of the Saxons, but they were more minutely defined.

Treason.

Among the *placita coronæ*, or pleas of the crown, the most important was that of treason, termed by the Saxons *Hlafordswic*, *proditio domini*, or the betraying ones lord. Treason, the term since used, contracted from the French *trahaison*, is derived from the Latin *traho*, to draw in, or betray, signifying properly the betraying of one to whom one owes fidelity. Thus Britton defines treason generally to

Britt. c. 8.

be every mischief which a man knowingly does or procures to be done to one, to whom he is in duty bound to be a friend. Offences which immediately affected the king's person or dignity, were comprehended by Glanville and subsequent writers under the name of *crimen læsæ majestatis* or *lese* majesty, called by the Mirror simply *majestie*, and by Britton, *grande* treason, or high treason, in distinction from *petit* treason, or such offences as affected private persons. Before the statute of the 25th of this reign, many things were considered as treason which were not afterwards considered as such. *Lese* majesty, according to the abovementioned writers, comprehended killing the king, and even imagining his death; promoting a sedition in the army and the kingdom; the *crimen falsi*, or falsifying the king's seal; the concealment of treasure-trove; and even the breaking of any of the laws and statutes of the realm, was reckoned by Bracton as a high presumption against the king's crown and dignity. "High treason," says Britton, "was, to compass the king's death, or disinherit him of his realm; to falsify his seal, or to counterfeit or clip his money; besides a person might commit treason against others several ways; as a villein procuring the death of his lord, who was seised of him, and those who drew persons into such perils as to lose life, or member, or chattels." In another place, he adds, that "they ought to have the same judgment as in high treason, who were attainted of counterfeiting or otherwise falsifying the seal of their lord, of whose dependence or homage they were; also, of committing adultery with the wives of their lords, or of deflowering their daughters, or the nurses of their children." Petty treason, called by Britton simply treason, was an offence committed by a private person against another to whom he was bound by ties of blood, affinity, or alliance, which caused his death, disinherison, or loss of homage; for the quality of the treason, says the Mirror, is the taking away of life or member, or decrease of earthly honour, or increase of villanous shame. He also enumerates many other offences, which, by

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Glanv. l. 14. c. 1.
Bract. 118.
Flet. l. 1. c. 22
Britt. ubi supra.

Bract. 119. 120.

Britt. ubi supra.

Mirr. c. 1. s. 7.

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construction, were included under the head of treasons, as abuses and extortions of office, and others which he calls *perjuria*; because, says he, every one that commits perjury lieth against the king. Many cases in this reign were, before the statute of treason, likewise ruled to be treason by construction, as in the case of John Gerbage, a knight, who was indicted *quod ipse cum aliis in campo villa de Royston in altâ regiâ viâ stratâ*, rode armed, with his sword drawn in his hand, *modo guerno*, and assaulted and took William de Bottisford, and detained him till he paid 90*l.* which was looked upon as an encroachment of royal power, as it was then called, that is, an attempt to exercise royal power, *contra sui ligeantiam regis*. He prayed his clergy; but was denied it, upon the ground that clergy was not granted in cases of treason and sedition; upon which, he refused to plead, and was put to his penance; but two of his companions were convicted, and had judgment, *quod distrahantur et suspendantur*. The Commons, alarmed at these constructive treasons, prayed that it might be declared in parliament what is accroachment of power, which should cause lords to lose their forfeitures and delinquents the benefit of clergy. It appears from this, that as the forfeitures in such cases accrued to the king, this was one motive for their interference. At the same time, they were anxious to have a crime defined which affected the liberty and property of all. The king did not immediately yield to their wishes; but, on the renewal of their petition, in the 25th year of his reign, he caused the well-known statute to be passed, which professed to declare what was and what was not treason. It comprehended high treason under four general heads; namely, first, compassing the death of the king, the queen, and the eldest son and heir, as also that of the chancellor, the treasurer, justices of the one Bench and the other, justices of Assize, and other justices in their place; secondly, violating the king's companion, or queen, the king's eldest daughter, unmarried, and the prince's wife; thirdly, levying war against the king, and adhering to the king's

21 Ed. 3. Rot. 23. Co. 3 Inst.

Hale's Hist. P. C. l. 1. c. 12. Hawk. P. C. l. 1. c. 2.

Pet. Parl. 21 Ed. 3. 15.

Stat. of Treason, 25 Ed. 3. st. 5. c. 2.

enemies; fourthly, counterfeiting the king's great and privy seal and the king's coin. By the same statute, petty treason included three particulars, namely, a woman killing her husband, a servant his or her master, or any ecclesiastic his prelate.

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Petty treason.

The concealment of treason was, by the old law, held to be treason; for he who knew another to be guilty of treason was to go instantly, says Bracton, or send, if he could not go, to the king himself; or, if he could not, to one of the familiars of the king, and relate the whole matter. He was not to stay two nights or days in a place, nor attend to any business of his own, however urgent. After this statute, the bare concealment of treason was not treason, where there was no proof of approbation or consent. This was afterwards called misprision of treason, and was not comprehended under the crime of high treason.

Bract. 119.

Co. 3 Inst. 7.

If what was designed was not brought about it would be no less treason, by a maxim of law then generally admitted, that *voluntas reputabitur pro facto*; so that, if a man had compassed or imagined the death of the king, and had declared his compassing by words or in writing, that was treason by the old law; but, by the statute of treasons, it was necessary that the compassing should be declared by some overt act.

Ibid.

Using the king's seal without warrant, was anciently reckoned among the higher kinds of treason; as also clipping or otherwise impairing the king's coin; but the statute restricts the offence of treason to the counterfeiting the king's seal or money.

Bract. Brit. and Flet. ubi supra.

The statute further adds, that because many other like cases of treason may happen in time to come, which cannot be imagined or declared at the present time, it was accorded that should any other case, not above specified or supposed to be treason, happen before any justices, they should tarry, without going to judgment, till the cause was showed and declared before the king and his parliament, whether it ought to be adjudged treason or other felony.

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After the statute had defined what was treason, it was not thought necessary to particularize what was not treason; but, to meet the particular case complained of by the Commons, a clause was added, that riding or going armed, to slay or rob a person, should not henceforth be adjudged treason, but was to be judged felony or trespass, according to the old law, as the case required.

40 Ass. 25.

The courts, in their decisions on this statute, not only conformed strictly to the letter of the statute, but in some cases refined upon its spirit: thus, in the 38th year of this king it was held, that adhering to the king's enemies was not treason; for what reason, says Mr. Reeves, it is difficult to say. In another case, where a Norman was captain of an English ship, having an English crew, and committed piracy, it was adjudged felony in him, because he did it in Norman, and treason in the others, who did it in English, because it was in them against the king's allegiance.

Bro. Cor. 36. Reeves' His. Engl. Law, iii. 118.

In high treason, all who gave aid and counsel were, by the common law, equally guilty of treason; and, as the statute makes no exception in their favour; it afterwards became a maxim in law, that, in high treason, there were no accessories.

Homicide.

Homicide, *homicidium*, from *homo* and *cædes*, that is, the slaughter of a man, was the general name for killing a man, which was an offence that partly concerned the party injured and partly the king, whose peace was broken. It was distinguished by Bracton from the cause and manner of killing, into homicide *ex justitiâ*, *ex necessitate*, *ex casu*, and *ex voluntate*. Homicide *ex justitiâ*, was what took place by the sentence of a court, and according to the forms of law; which, to be justifiable, required to be done in due order and course of law. Homicide *ex necessitate* or *se defendendo*, was justifiable if the necessity was inevitable, as in defence of one's own person. Homicide *ex casu*, or *per infortunium*, that is, by misadventure, was, where a person threw a stone at an animal, and another person accidentally passing was struck by the stone and killed; or

Bract. 120.

when a tree was falling, and it fell upon the passer-by, and killed him. It was here to be considered, not only whether the act was in itself lawful and proper; for, if the act was unlawful, then it was held to be murder, or voluntary homicide: as if A. meaning to steal a deer, shot at it, and killed B. It was also to be considered, whether due caution had been used, or whether it was a place of great resort. So likewise, if an act was lawful and proper; as if a man corrected his scholar, without exceeding the usual bounds, homicide was not to be imputed to him. This kind of homicide, which is now called manslaughter, was sometimes denominated chance medley, when the killing of a man was *se defendendo*, in self-defence, in a medley, that is, a scuffle, affray, or sudden quarrel. Voluntary homicide was, when any one of certain knowledge, and by a premeditated assault, from anger, malice, or gain, killed another, *nequitur* and *in felonia*, against the king's peace. If this was done in an affray, it was equally felonious with a secret and deliberate killing; and all who were present were looked upon as *participes criminis*, according to the old law. If the act was perpetrated in secret, it was termed *murdrum*, as in the time of Glanville, who divides homicide into simple homicide and *murdrum*. This distinction is doubtless derived from the time of Canute, when, to prevent the secret killing of his countrymen, the Danes, he made a law that if any one was killed, and the slayer escaped, the person killed should be taken for a Dane, unless proved to be English by his friends and relations, and on failure of such proof, that the *vill* should pay forty marks for the death of the Dane. The Conqueror revived this law in favour of Frenchmen, and imposed a similar fine, called *murdrum*, upon the country, unless the killer was known or Englisherie was duly presented; that is, the party was proved to be an Englishman, and not a Frenchman. As the purpose of this law had long ceased, presentments of Englisheirie were abolished by a statute in the fourteenth year of this king.

Bract. ubi supra, 120. Brit. c. 7. Flet. l. 1. c. 30.

Chance medley.

LL. Inæ. c. 33. Bract. 121. Brit. c. 7. Flet. c. 23. Mirr. c. 1. s. 11.

Murdrum.

Leg. Confes. c. 15, 16. LL. Gul. 1. c. 26. apud Wilk. Bract. 134.

Presentments of Englisherie.

Stat. 14 Ed. 3 st. 1. c. 4.

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If, in Bracton's time any one struck a pregnant woman so as to cause abortion, it was homicide, after the fœtus was formed. This appears to have been the law in the time of the Saxons; but in this reign the law was altered in this particular; for killing a child in *ventre sa mere* was not felony, because such a child was held to be not in *rerum naturâ*, and could not therefore be said to be *occisus*. In cases of homicide *se defendendo*, the defendant was required to prove that he was under an absolute necessity to act in his own defence. Where one pursued another with a stick, and the person struck returned the blow, and killed the pursuer, this was held to be felony, because the killer might have made his escape, instead of resisting the assault. If any one killed a thief, by whom he was pursued, or by whom his house was attacked in the night, according to the old law, he was to go quit: but Bracton adds the proviso "si ille aliter se defendere non potuit." In this reign, it was likewise held, that where thieves came to rob, or burglariously break into a house, they might safely be killed: so likewise, if a gaoler was attacked by his prisoners, he was justified in killing them, if they could not otherwise be taken.

LL. Alf. c. 6. 22 Ass. 94. 43 Ass. 31. LL. Inæ. c. 16. Bract. 144. 26 Ass. 32. 22 Ass. 55.

Homicide appears to have been extended to several other cases since the time of Bracton; as, if a judge, through malice or cruelty, condemned a man to death; or a gaoler kept a prisoner in such duress that he died, it was homicide. So likewise, if any one, not duly authorized, took upon him the cure of a man, and the patient died under his hands; or if a person, by swearing falsely, or in any other manner, caused another to be judicially condemned to death, in such cases the persons were then guilty of felony; but the latter case was not held in aftertimes to be murder.

Brit. 14.

If a person at that time attempted to kill another, although death did not ensue, it was adjudged to be felony, according to the maxim before cited, that *voluntas reputabitur pro facto*; but the law was otherwise in aftertimes; for, if the party did not die, it was no felony.

15 Ed. 3. Fitz. 383. Stanf. P. C. 17.

The *crimen incendii*, burning, or arson, as it was now called, comprehended not only the burning a city, town, house, man, beast, or other chattel, feloniously, in time of peace, from hatred or revenge; but if any one put a man into the fire, whereby he was burnt or blemished, although not killed, he was to be dealt with as a burner. Arson, called by the Saxons *bernet*, was among the number of irredeemable offences.

Arson. Brit. c. 19. Mir. c. 1. s. 8. Ante, p. 38.

Theft, *furtum*, was the general name for the taking the property of another, provided it was done, *animo furandi*, for otherwise no theft was committed. According to the manner of the taking, it was distinguished into robbery, burglary, and larceny. Robbery, in the Latin of the middle ages, *robberia*, is sometimes derived from *roba*, a robe, signifying to strip a man; but most probably it comes from the Saxon *reafan*, and the German *rauben*, and the Latin *rapere*, signifying to seize with violence from the person. The maxim of *voluntas reputabitur pro facto*, was applicable to this crime as to those above mentioned; for, if a person attempted to rob another, although he took nothing, it was adjudged to be felony.

Theft. Bract. 150. Glanv. l. 14. c. 1. 25 Ed. 3. 42.

Under burglary was comprehended, not only the breaking of a house, but the felonious assault upon persons in their houses, whether the assault was with design to kill, rob, or beat; also, the forcible entry into any person's house, and doing violence there against the peace, by day as well as by night, whether the house were broken or not. Burglary is mentioned in the laws of the Saxons under the name of *hamsocne*, from *ham*, home, and *socne*, a privilege, signifying the violation of a person's home; and also under that of *husbrec*, housebreaking, *infractio domus*. Burglars are called by Britton *burgessours*, and by Bracton *burglatores*, which, from *burg*, a burgh or town, and *lator* or *latro*, a robber or breaker into, signified properly a robber of towns or houses, as distinguished from one who robbed from the person. Burglars are described by Britton, to be such as feloniously, and in time of peace, break churches or the

Burglary. Bract. 144. Mir. c. 109. Brit. fol. 17. LL. Can. c. 6.

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mansion-house of others, or the walls or gates of cities. The writers in this day make no mention of the time of night as a characteristic of this crime.

Larceny. Mir. c. 1. s 10.

The last species of theft, called in Latin *latrocinium*, in French *larcine* or *larcyne*; in English, larceny; is described by the Mirror to be the treacherously taking from another a moveable or corporeal thing, against his will, by the evil-getting possession thereof. Britton distinguishes larceny into grand and petty: when the thing stolen was above the value of 12*d*., it was grand larceny, and a capital offence; but, if it was 12*d*. or under that sum, it was petty larceny, and, by stat. West. 1, a bailable offence. This distinction of theft, as to the value of the thing stolen, was first made in the laws of Athelstan. Bracton likewise makes a distinction between *magnum latrocinium* and *parvum latrocinium*, or *furtum de re minima* and *re majore*. In the reign of this king, as also in the time of Edward I., there was some diversity of opinion as to the amount which constituted grand larceny, whether it should be 12*d*. or above 12*d*.; but the better opinion, which was afterwards the settled law, was, that it should be above that sum.

Brit. c. 24. Flet. l. 1. c. 36.

Ante, p. 37.

Bract ubi supra.

If the thing taken were not moveable nor corporeal, as of lands, rents, advowsons, and the like, it was not larceny. Besides, it was necessary for the thing to be taken treacherously to constitute a larceny; for, if the taker conceived the goods to be his own, and thought he might take them lawfully, it was not larceny. Under this name were comprehended many frauds, which have since been considered as cheats and civil injuries; as, false weights and measures, tricks in trade, and the like.

Bract. 150.

There was also a distinction between theft that was manifest and theft that was not manifest; the former of which was called by the Saxons *openthifte*, and was, according to the laws of Canute, among the number of inexpiable offences. By a law of Wihtred, any one caught in open theft, *hand habend*, that is, having the thing stolen in his hand, was either to be put to death, sold as a slave, or pay his full were. The

Ante, p. 37.

LL. Wiht. apud Wilk. 12.

same distinction was observed in Bracton's time, and for some time after, particularly in regard to offences against the forest laws; where the being taken in the *mainour* was particularly regarded, as before observed.

Theftbote was held to be, not where a man took his own goods from a thief, but where he accepted the goods of the thief, in order to screen him. This was a heinous offence among the Saxons, and was punished with the full were. Letting a thief escape also subjected the offender, in those days, to the same punishment as the thief.

42 Ass. 5.

Ll. Athelst. c. 17. Ll. Inæ. c. 36.

Rape.

The crime of *raptus virginum*, or rape, was not confined to virgins or unmarried women; but was, as the Mirror defined it, *chascun afforcement de feme, de quel le condition qu'il soit*, so that even a prostitute was by law protected from such acts of violence; and such was the law in the time of Bracton; but the law required then, as it is does now, that a woman who had suffered an injury of this kind should establish the charge by the most indubitable evidence, and, while the fact was recent, should go to the next village and show the injury that had been done to her. She was also to do the same to the chief officer of the hundred, the coroner, or the sheriff; and lastly, she was to make her complaint publicly at the next county court, which was to be described in the coroner's roll. Besides, it was necessary to prove the completion of the offence, which was done by four *legales fœminæ*. By the Norman law, this matter was tried by the inspection of seven matrons. A charge of rape could not be sustained if the woman were proved to have given her consent. It was also a good plea, in an appeal of rape, to say that before the time of the supposed ravishment, the woman had been the mistress of the ravisher; also, if a woman was pregnant by her ravisher, it was considered, according to Britton, to be a proof of consent. In this respect the common law differed from that of the civil law, where the consent of the woman did not alter the nature of the offence; besides, the forcible abduction of a woman was, among the Romans, equally penal with that of deflowering

Mir. c. 1. s. 12. Bract. 146.

Bract. 147. Brit. c. 1. Grand Cout. de Norm. c. 67.

Cod. 9. tit. 13.

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her. Besides, by the common law, the man might, at the discretion of the judge, escape the penalty of his offence, if the woman consent to marry him.

Glanv. l. 14. c. 6. 148.

Mayhem.

Another offence against the person, frequently mentioned in that day, was that of *mayhem*, in the Latin of the middle ages *mahemium*, from the French *mehaigner*. By *mayhem* was understood any corporeal hurt by which a man lost a member, so as to make him less fit for fighting, as the loss of a hand, an arm, or finger, foot, eye, front teeth, &c.; but the striking out the grinders, or cutting off an ear, was not a *mayhem*, because a man might defend himself equally well in battle without them. Castration was, however, adjudged to be *mayhem*, although committed by a husband upon the adulterer with his wife. Among the laws of the Saxons, particular cognizance was taken of injuries done to the person; but the distinction between *mayhem* and ordinary wounds was, in all probability, derived from the Normans, in whose code we find it described in nearly the same terms.

Bract. 144. Brit. 48. Flet. l. 1. c. 38. Mir. c. 4. Grand Cout. de Norm. c. 79. Co. 3 Inst. 118.

Common assaults and batteries were, for the most part, treated as civil injuries, except in aggravated cases, where the sacredness of the person or place was violated. Since the Conquest, as well as before, the common law afforded a more than ordinary protection to the persons of the clergy; and, in conformity with this, we find it expressly enacted by the statute of *Articuli Cleri*, in the 9th year of Edward II. that, if any person lay violent hands upon a clerk, he was to be indicted at the suit of the king for a breach of the peace; and also subjected to the censures of the church imposed upon him in the spiritual court: besides which, he might be sued in the temporal court for the special damage sustained by the party injured.

Striking a clerk.

Striking in courts.

For a similar reason, out of regard to the sacredness of a court of justice, where the king's majesty resided, striking in the king's courts was treated as a criminal offence of more than ordinary magnitude, as it had been in the time of the Saxons.

Ante, p. 38.

Usury.

Usury was considered a heinous offence in those days; but

it does not appear to have been prevalent among the Saxons, as we find no cognizance taken of it before the reign of Edward the Confessor, when the growing luxury of the age, and corruption of morals, had introduced extravagance and given encouragement to usurers.

Forestalling.

Forestalling was another offence at common law, which was looked upon in a heinous light. The word is derived from *fore* or *fare*, a way or passage, and *stall*, an impediment, signifying an intercepting of goods in their way to the market; and comprehended under it every means which was taken to enhance the common price of any merchandise, whether by spreading false rumours or buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market; or engrossing, that is, buying up all things in large quantities to sell again wholesale. To prevent this offence, a law of the Saxons forbad any thing above the value of twenty pence to be sold without any town, and that all bargains were to be made in the open market, and in the presence of the borough reeve, or some trustworthy person. A similar law is to be found in the code of the Conqueror. Among the ancient statutes, is one ascribed to Edward I., against *forestellarii*, who, for the first offence, were to be grievously amerced; for the second offence, to be condemned to the pillory; for the third offence, to be imprisoned; and for the fourth, to abjure the *vill*. By a statute in this king's reign, all victuallers were obliged to sell their commodities at a reasonable price.

43 Ass. 38. 3 Inst. 195.

LL Ethel. c. 12.

LL. Will. Conq. c. 60.

Felony.

Every capital crime, not excepting treason, was, before the reign of this king, included under the name of felony; but it was resolved that, in the king's charters of pardon, the word felony should extend only to common felonies, and not comprehend treason under that name. Felony, in the Latin of the middle ages *felonia*, is supposed, by Spelman, to be of feudal origin, and derived from the German words *fee* and *lohn*, a reward or value, signifying any act which was as much as a man's fee was worth; because, for every felony a man forfeited his fee: but Lord Coke derives it from the

Co. 3 Inst. 15.

Spelm. Gloss. in Voc.

Co. 3 Inst. 56.

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Latin *fel*, gall or malignity, signifying what was done *felleo animo*.

Punishments. LL. Gul. 1. c. 7.

Punishments had increased in severity since the Conquest in proportion to the number and enormity of crimes. The punishment of death was, as we have seen, inflicted on several crimes among the Saxons; but the Conqueror made a law to abolish the punishment of death, and inflict in its stead all kinds of mutilations, that, as it is observed in the law, the trunk might remain a living mark of the offender's wickedness and treachery. In the reign of Henry I. the Saxon punishments were for the most part reverted to, except in the case of theft or larceny. Persons convicted of *furtum* or *latrocinium*, were to be hanged, without having the opportunity of redeeming their crime by the payment of the *were*. In the time of Bracton, we read of various corporal punishments, as beheading and hanging, for the men, and drowning, for the women, denoted by the words *furca et fossa*; besides burning, burying alive, mutilations, imprisonment, banishment, abjuration of the realm, pillory, &c. To these were added degradation, forfeitures, fines, and amercements. Bracton also speaks of torture; but this does not appear to have been favoured by the common law, although admitted by the civil law. The infliction of these penalties was either discretionary or regulated by the practice of the courts. The crime of high treason exceeded all others as regarded the punishment. In the laws of Henry I., we read of beheading, and even flaying alive, as the penalty of this offence. In the time of Bracton, any one convicted of treason was at the king's mercy both for life and limb; and, in the reign of Edward II., we find that the punishment of such offenders was accompanied with all the circumstances of aggravation, such as that of drawing and quartering, which have since been usual in those cases. Persons convicted of treason were likewise attainted, and all their lands and goods were forfeited to the king, agreeably to the laws of the Saxons, among whom, this was reckoned one of the inexpiable offences.

LL. Hen. 1. apud Wilk. LL. Anglo-Sax. p. 30.

Bract. 104.

Co. 3 Inst.

Bract. 165.

LL. Hen. 1. c. 75.

Glanv. l. 14. c. 1. Bract. 118. Flet. l. 1. c. 21. Mir. c. 1. s. 6. LL. Alf. c. 11. LL. Can. c. 61.

All persons attainted of petty treason were to be burnt, which punishment, as regarded women, was in all probability derived from the ancient Gauls and Britons, among whom there was a similar practice. The lands and hereditaments of one convicted of petty treason were forfeited to the lord of the fee, but the goods and chattels to the king.

Edw. III. Cæs. Com. l. 6. c. 18.

The *crimen falsi*, or forging of seals, when it concerned neither the king nor the lord of the fee, was not treason of either kind, and was therefore punished with the pillory, or loss of ears, &c.

Flet. l. 2. c. 31.

The judgment in most cases of arson was, that the offender should be burnt, that he might suffer in the same manner as he had offended; sometimes, however, he was hanged. Those convicted of heresy, and also of conjuration, witchcraft and sorcery, which were branches of heresy, were to be burnt. Heretics likewise underwent the additional punishment of excommunication, degradation, and forfeiture of goods; although Lord Coke denies that the latter was any part of the judgment in heresy by the common law. But it is to be observed, that heretics were charged with divers offences, as treason, conspiracy, and the like, besides their opinions. Sodomites were either to be burned or buried alive.

Mir. c. 4.

Bract. 123. Brit. c. 9. Flet. l. 1. c. 35. Mir. c. 4. s. 14. Co. 3 Inst. 43.

The crime of rape was anciently punished with death, by hanging; but, in the time of Bracton, those who were convicted in an appeal of *raptus virginum* were to lose their eyes and the offending members; but the punishment was greater or less, according to the condition of the woman, whether married or single, or a nun. An attempt was made, in the reign of Edward I. to reduce the penalty still more by statute; but as this relaxation in the laws occasioned an increase of the offence, this statute was soon after repealed, and rape was again made felony, and punishable after the old manner.

Stat. West. 1. c. 1. Ed. 1. c. 13.

Stat. West. 2. 13 Ed. 1. c. 34.

Homicide was variously dealt with according to the light in which the offence was viewed. Voluntary homicide was, in all cases, a felony. In the case of homicide *per infortu-*

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21 Ed. 3. 17.

nium vel se defendendo, the defendant might, by the stat. of Gloucester, have his charter of pardon; but, nevertheless, he was to forfeit all his goods and chattels. In justifiable homicide, as when it happened in the execution of a lawful process, or *se defendendo* against a thief, the defendant, on the justification being proved true, went quit without any charter of pardon.

Felo de se. Bract. 144.

A man committed felony in killing himself, as in killing another; whence the act of suicide was denominated *felonia de se*, and the person was called *felo de se*. In Bracton's time, if a man, charged with any crime, killed himself, he was attainted, and his lands, as well as his goods, were forfeited, because this was looked upon as amounting to a conviction; but, if he killed himself *tædio vitæ vel impatientiâ doloris*, his inheritance was saved although his moveables were forfeited.

Brit. c. 7. Grand Cout. c. 21. Mir. c. 1. s. 13.

In the reign of Edward I., and after that time, the law appears to have so far altered, that a *felo de se*, whatever offence he had committed, of which he was not attainted in his lifetime, did not forfeit his lands, only his goods and chattels. The same was the law in the Norman code.

Breaking prison. Stat. de Frangentibus Prisonam, 1 Ed. 2.

Breaking prison was, by the old common law, a felony, whatever might be the offence for which a person was imprisoned, but by the stat. Ed. II. *De Frangentibus Prisonam*, the common law was so far altered, that no one was to have judgment of life or member for breaking of prison, unless the offence, for which he was imprisoned, required such judgment.

Striking in the king's palace or courts, punished with the loss of the right hand. LL. Inæ. c. 6. LL. Alf. c. 7. LL. Can. c. 50.

Striking in the king's palace was, by the Saxon laws, a capital offence, for which the party offending was at the king's mercy for life or member, and forfeited all he had. At this time, and probably since the Conquest, it had become the law, that if any one drew a weapon upon any judge or justice in Westminster Hall, or in any of the king's courts, he was to lose his right hand, to be imprisoned perpetually, and forfeit all his goods and chattels, and, as it should seem, his lands too in this reign; but Lord Coke supposes the forfeiture of lands was only for life, but it is

most probable that this depended on the nature of the offence, whether aggravated or otherwise.

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The striking a juror, for giving a verdict against a man in Westminster Hall, was punished with the loss of lands and goods, besides the amputation of the right hand. Besides, not only those who were guilty of such an act of violence, but also those who disturbed such courts, by threatening or reproachful words, to any judge sitting in them, were guilty of a high misprision or contempt. In the time of Edward I., one William Bruce, upon hearing judgment given against him in the Exchequer, said to the chief baron, "Roger, Roger, thou hast had thy will of me, which of a long time thou hast sought, and I will remember thee," was, for these words, imprisoned during the king's pleasure, and ordered to walk from the King's Bench to the Exchequer, bareheaded and ungirt, and to ask forgiveness, &c. This is a part of the common law which, as respects the offence, has remained unaltered to the present day, and in regard to the punishment, is no otherwise altered than as the king, by his prerogative of mercy, may think fit.

EDW. III. 41 Ass. 25. Co. 3 Inst. 142.

The malpractices of justices were punished with heavy fines, and even with death, as in the time of the Saxons. In the case of Chief Justice Thorpe, who, in the 24th year of this king, was convicted of bribery; the judgment was, that he should be hanged, and should forfeit all his lands, tenements, goods, and chattels, to the king; bribery in a judge being then looked upon as a sort of high treason.

Standing mute.

Standing mute, or refusing to plead, on a criminal charge, is first mentioned in the reign of Edward I.; when the punishment for this offence, called *peine forte et dure*, or the penance, is treated of by Fleta and Britton, and is expressly ordained by the stat. Westm. 1., which directed that those who would not put themselves on inquests of felonies, should be put *en la prison forte et dure*, by which as it is explained by those writers, it was understood that they were to lie barefooted, ungirded, and bareheaded, in their coat only, in prison, upon the bare ground continually

Britt. c. 4. Flet. l. 1. c. 24.

Peine forte et dure.

night and day, that they should eat only bread made of barley and bran, and drink only water, that they should not drink on the day they ate, nor eat on the day they drank, and that they should be fastened down with irons, until they prayed that they might put themselves on their trial.

In what manner such offenders had been dealt with before this time can only be conjectured; some supposing that they were treated as convicted felons and hanged, and others that they were simply remanded to prison, but the most probable inference is, that a penance was a practice at common law which, owing perhaps to the increase of the offence, had been rendered more severe.

Co. 2 Inst. 178, 179.

In the reign of this king, persons standing mute appear to have been hanged or put to their penance, according to the circumstances, at the discretion of the court. In the 21st year of this king, a man was appealed of robbery, and was taken at the plaintiff's suit with the *mainour*. On his standing mute an inquest, *ex officio*, was empannelled to try whether he could speak, and when they found that he was mute of malice, he was adjudged to be hanged. It was then said, that had it been at the suit of the king, he would have been put to his penance, there being a distinction between an appeal and an indictment. But this does not appear to have been the ground of the judgment. In another case of appeal the offender was put to the penance, and, on the other hand, in the case of provors standing mute on their arraignment, it appears that they would be hanged, most probably because the previous confession of the provor, and also the being taken with the *mainour*, were considered as convictions of themselves, upon which, as Mr. Reeves observes, it might be safe to execute an obstinate offender. Standing mute was more frequent in those days, in order to avoid the forfeitures and other evil consequences which would befall the children, in case of the parent's conviction.

21 Ed. 3. 18.

43 Ass. 30. 26 Ass. 13.

Reeves' His. iii. 134.

Barr. Obs. on the Stat. 74.

Usury was dealt with as a criminal offence. By a law of Edward the Confessor, usurers were banished the kingdom, and all their goods were forfeited. In Glanville's time the law

had somewhat relaxed in favour of usurers, who were not convicted of this offence while living. In the time of Bracton it appears to have been one of the articles of the charge of inquiry by justices in Eyre "de usurariis Christianis mortuis, qui fuerunt et quæ catallæ habuerunt." By a statute in the 15th year of this king it was ordained, that the king and his heirs should have cognusance of usurers after their death, and that the ordinary should have cognusance in their lifetime to compel them by the censures of the church to make restitution of their unlawful gains. The Jews, however, were, it should seem, permitted, on the payment of large sums, to carry on this nefarious kind of dealing until the reign of Edward I., who, seeing the mischiefs which ensued from this bad practice, put a stop to this trade by the stat. *De Judaismo*, which obliged them to leave the kingdom in great numbers. After this, the crime of usury was visited with heavier penalties, and subjected the offender, not only to the loss of all his goods, but also of his *libera lex*.

Flet. l. 2. c. 50.

Perjury.

Before the Conquest there appears to have been no distinction between perjury in witnesses, and that in jurors, probably because all were looked upon as witnesses. As the character of a witness and a juror gradually became more distinct, the punishment of perjury in the one was not so severe as in the other. Witnesses, when convicted of perjury, were punished, sometimes with the forfeiture of all their goods, sometimes with banishment, and sometimes only with a fine; but when, as before observed, perjury affected the life of a man, it subjected the perjurer to the pains of homicide. It is also worthy of observation, that the subornation of perjury was itself perjury. The punishment of perjury in jurors was very severe, for the judgment against them was twofold, namely, at the suit of the party wherein the plaintiff recovered damages and the defendant was imprisoned, and at the suit of the king, if the parties were convicted. The judgment, which was called a villeinous judgment, was, that they should lose their *liberam legem*; so that they could

Mir. c. 4. s. 8.

Brit. 14.

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not be put on any assize or jury, nor their testimony as witnesses be taken; if they had any thing to do in a court they were to make their attorney; they were to forfeit all their lands and goods to the king; that their lands were to be wasted, their houses rased, their trees rooted up, and their bodies committed to prison: which judgment was called villanous, because it brought the party into a state of villany and shame; and, as the offence was committed by means of perjury and falsehood, it was treated in the same manner as an attaint in the assize. The offence of conspiracy, which, since the time of Edward I., had become an object of consideration, might be prosecuted, either at the suit of the party, when the judgment would be only fine or imprisonment, or at the suit of the king, when it should seem that the judgment, at this time of day, on such an offender, was the same as that on attainted jurors, namely, the villanous judgment, to lose his *liberam legem*, &c. for conspiracy was looked upon as a confederacy, to indict another falsely, and was near akin to perjury. It is said, however, that there has been no instance of this judgment since the reign of this king.

Ante, p.117. Co. 3 Inst. 222.

Ante, p. 39. Stat. West. 1. 1 Ed. 1. c. 34.

Spreaders of false reports were not punished so severely now as in the time of the Saxons. By the stat. Westm. I. they were to be imprisoned until they discovered the authors of the tales. Misprision of felony and theftbote were punished with fine and imprisonment, and the offences of brewers, bakers, and forestallers, were punished with the pillory or the tumbrel. The punishments in other cases, inflicted by statute, have been already mentioned.

Accessories.

As to the law respecting principal and accessory, it has already been stated, that in high treason, all who gave their aid, counsel, and consent, were, by the common law, considered as equally guilty; whence it became a maxim in law, that in high treason there were no accessories, but all were principals. According to Bracton, the aider and abettor in other crimes, as homicide, or robbery, &c. whether present or absent, when the fact was committed, was only

Bract. 120.

an accessory, and the same opinion was held by some judges in this reign; but the better opinion, which afterwards prevailed, was, that all who were in company in any place or assembly, should each be held as principal, although he actually did no ill. This was agreeable to the Saxon laws, by which all who were present at the death of a man were considered as *participes criminis*. The lending of arms to a man to commit homicide made a man an accessory, according to another law of the Saxons.

25 Ed. 3. 44. Stanf. P. C. 40. LL. Alf. c. 38. Wilk. LL. Anglo-Sax. 44.

If any one received, aided, or favoured, *receptavit et comfortavit*, a felon, knowing him to have committed felony, he was held to be an accessory, or, as Bracton terms him, *receptator malorum*. But if he aided him *per bon parol*, or suit, or sent letters for his deliverance, this did not make him an accessory, this being considered a great misprision only. There appears to have been no such distinction among the Saxons, the least favour shown to a thief subjected a man to be dealt with as a thief.

Bract. 138. 26 Ass. 47. Co. 3 Inst. 139. Ante, p. 37.

If a wife received her husband, knowing him to be a felon, this did not make her an accessory, on account of the duty and love she was supposed to bear towards him. This is a piece of the old Saxon law which was still retained.

Co. 3 Inst. 108. LL. Inæ. c. 50.

Receiving the goods stolen and not the felon, did not make a man an accessory at this period.

Fitzh. Cor. 126. 25 Ed. 3. 39.

An accessory could not be guilty of a higher crime than a principal: a servant procured another to kill his master, and as this was only felony in the principal, it could not be petit treason in the accessory.

40 Ass. 25.

In regard to the manner of dealing with accessories, it was a maxim of the common law, that an accessory was not to be put to answer, until the principal was attainted. Bracton says, "Si omnes presentes sint tam de fortia, quam de facto, procedatur contra omnes per ordinem dum tamen illi de fortia non respondeant, antequam factum convincatur." As this point of law was either not settled, or not properly understood, in the reign of Edward I., it had become the practice, in counties, to outlaw

Bract. 127

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accessories before the principal was convicted; wherefore, to correct this irregularity, the common law was declared by the stat. Westm. I., namely, that none should be appealed of *commandement, force, aide, ou de receptement*, under which terms were comprehended what are now called accessories before and after the fact, until the party appealed of the fact was attainted.

Stat. West. 1. 1 Ed. 1. c. 14.

Modes of prosecution.

The two modes of prosecuting offenders, in use at this period, were appeals and indictments.

Appeals.

Appeal, from the Latin *appello* to call upon, signifying properly a call upon one to answer a charge, was a prosecution at the suit of the party. It is first mentioned by that name in the laws of the Conqueror, in connexion with the trial by battle. The party accusing was, in such cases, called the appellant or appellor, and the party accused, the appellee. Appeals took their rise from the practice which prevailed among the Saxons and other people, of considering all offences as private injuries which might be compensated for by the payment of a fine. When the trial by battle was introduced, it was usual for the appellant to offer to prove his charge *per corpus*, and the defendant, unless excused by reason of age or wounds, or being an Englishman, was, in the time of the Conqueror, expected to defend himself in the same manner. Appeals were brought in those days for homicide, rape, larceny or robbery, arson, *mayhem*, as also *de pace, plagis, et imprisonamento*, which were all personal and private injuries; but besides these, there were likewise appeals of treason, which, though a public offence, was looked upon, in those days, as an injury done to every individual, whose business it was to prosecute the offender This latter kind of appeals might be brought, either in the common-law courts, the parliament, or the court of the Steward and Marshal in cases of treason done out of the realm, but it is supposed that such appeals in the common-law courts were taken away by the stat. 5 Ed. 3. c. 9, and 25 Ed. 3. c. 4, by which none should be put to answer except by indictment or presentment.

Ante, p. 47.

LL. Gul. 1. c. 68, 69, et seq.
Glanv. l. 14. c. 2, et seq.
Bract. 137, et seq.

4 Comm. 113.
Stat. 5 Ed. 3. c. 9.
Stat. 25 Ed. 3. st. 5. c. 4.
1 Hale, 349.
1 Hawk. P C. l. 2. c. 23.

No person was admitted to prosecute an appeal of homicide, except the nearest akin; women might not bring such an appeal except for the death of a husband. No one, convicted of felony, could bring an appeal against another, as the law pronounced of such persons that *frangitur eorum bacculus*, meaning that they were disabled from deraigning the duel in proof of any charge, yet if a person confessed his crime, and was not regularly convicted, he might become *probator*, or prover, and the king would grant such a one his life, upon condition that he would contribute to free the country from felons.

Glanv. l. 14. c. 1.
Bract. 142.
Mag. Chart. c. 34.
Bract. 152.

Provers.

Reeves' His. ii. 43.

A man who thus confessed his crime was to accuse others as his accomplices, but if the person so accused was a liege man to some one, or in frankpledge, and testified his willingness to put himself upon the country, he was, in Bracton's time acquitted, and the prover was condemned as a base and convict felon; but if he had no lord to vouch for him, nor was in any *decenna*, nor willing to put himself upon the country, he was then looked upon in like suspicious cirucmstances as the prover, and they were then permitted to wage the battle.

Bract. ubi supra.

It was held in this reign, that if a prover received the king's pardon after the appeal, the appellee went quit; but if he disavowed his appeal or died, the appellee was to be arraigned at the suit of the king; where provors failed in the terms on which they were to have their lives, they were dealt with as felons.

47 Ed. 3. 5.

The prosecution by appeal was now beginning to go out of use. Appeals *de pace, plagis et imprisonamento* were now nearly superseded by actions of trespass. Capital appeals, where the duel was resorted to, were subject to various restrictions, imposed by statute or by the common law, and in proportion as wager of battle was discouraged, they shared its fate. By the same rule as the trial by jury was encouraged, indictments came more and more into use.

Hawk. P. C. l. 2. c. 23.

Indictment, in French *enditement*, and the Latin of the middle ages *indictamentum*, from *indico*, to show, was an

Indictments.

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accusation at the suit of the king. It is first mentioned by that name by Bracton, and is described by him as a proceeding *per famam patriæ*. This, as Mr. Reeves observes, was probably the same as the *fama publica* of Glanville, which was a suspicion entertained by grave and good men, deserving of credit, that raised a presumption against the party, and led to the inquest by the grand jury, in the form and manner before stated. That a similar proceeding existed in the time of Henry I., may be inferred from one of his laws, and it is equally probable, that it was a part of the office of the twelve thanes, with the sheriff, to inquire into the offences of such suspected persons when no one stood forth as a public accuser.

Bract. 143. Reeves' His. ii. 51.

Ll. Hen. 3. c. 45.

As this mode of prosecution grew into more general use, several provisions were made by statute for the regulation of indictments. It was required, by statute Westm. 2. c. 13, that when presentments were made by jurors at the sheriff's town, they were to set their seals to the inquisitions taken of malefactors. The inquisitions were likewise to be in writing and to be framed with all possible deliberation, and in due form. The presentment of offences was, as before observed, peculiar to the office of the *grande inqueste*, as the grand jury was now called. In Bracton's time it appears, that the same jury made the presentment, and determined finally on the guilt or innocence of the accused at the trial; but, in this reign, the office of the grand and petty jury was performed by different persons.

Stat. West. 2. 13 Ed. 1. c. 13.

Ante, p 155.

From this new practice arose some abuses, which it was necessary to guard against. One of these abuses was, that in the interval between the taking of the indictment and the trial, indictors would, for purposes of their own, get themselves put upon the inquest of deliverance; for that reason it became a very common challenge to a juror, that he was one of the indictors. As this was not, however, found to be a sufficient remedy, a statute was made in this reign, on the petition of the Commons, enjoining, that no indictor should be put on inquests, upon deliverance of the in-

Reeves' His. ii. 459.

Pet. Parl. 14 Ed. 3. 30.

Stat. 25 Ed. 3. st. 5. c. 3.

dictees of felonies or trespass, if he was challenged for such cause by the person indicted. The courts, acting up to the spirit of this statute, imprisoned and heavily fined the foreman of a jury, in an action of trespass, who had been one of the indictors in that action, saying, that he ought to have challenged himself.

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40 Ass. 10. Reeves' His. Engl. Law, iii. 136.

When an offender absented himself immediately after the fact, it was usual, according to the old law, to raise *hutesium et clamorem*, hue and cry; and a suit, called fresh suit, was made after him, from town to town, until he was taken; and in default of so doing, the township was in *misericordia*. According to the law, as it subsisted in the time of the Saxons, and sometime after the Conquest, the fugitive, if he did not immediately surrender himself, was declared an outlaw without any further trouble; but, in the time of Bracton, it had become usual to proclaim him five several times in the county court, and, in case of his nonappearance on the fifth proclamation, sentence of outlawry was pronounced against him.

Hue and cry.

Ante, p. 41.

Bract. 125.

When a person was outlawed, whoever fed or harboured him was subject to the same penalty as the outlaw himself, who, on this account, was called a friendless man, because, by law, he could have no friend. In the Saxon he was called *wulfesheofod*, because any one might kill him with impunity. But this was not the law in Bracton's time, or at least not generally so; for it appears, from this writer, that an outlaw might not be killed, unless he made resistance or refused to surrender. An outlaw, at that period, likewise forfeited every thing, whether in right or in possession; but the law was rather relaxed in its rigour towards such persons in this reign, for debts on simple contract were not forfeited.

Outlawry.

Lib. Constit. Ethelred. apud Wilk. 110. 116. Co. 3 Inst. 128.

Ante, p. 38. Bract. 127. Reeves' His. ii. 20.

34 Ed. 3. 241.

When persons were committed to prison for treason or any other offence, it appears, that in the reign of Henry III., if not earlier, they were not to be confined in chains, as they had been heretofore; for "carcer," says Bracton, "ad continendos non ad puniendos haberi debet;" nor

Prisoners not to be ironed.

Bract. 105. 137.

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were they, when brought into court to take their trial, to be bound either hand or foot, unless there was fear of an escape. Besides, persons committed for any offence were not, before conviction, to be despoiled of their goods, but were to be supported in prison until their trial. So, likewise, in this reign, the law was, that the sheriff might not seize and carry away the goods of a felon immediately upon his being indicted, but he was to take surety of the party that they should not be withdrawn, and if he would not give surety, they were to be put into the hands of neighbours.

43 Ed. 3. 24.

A prisoner was allowed to challenge, without assigning any cause; although, in the reign of Edward I., the king, giving up this privilege, out of a merciful consideration of the accused, it was enacted, that the king should challenge no jurors without assigning a cause certain. To prevent this privilege from being abused, the number of peremptory challenges (for so these challenges were afterwards called) was limited to thirty-five. Where a defendant challenged thirty-six, or three full inquests, without cause, he was considered by the court as standing mute or refusing to be tried; but if he showed sufficient cause, he might challenge even more.

Stat. 33 Ed. 1. st. 4.

Reeves' His. iii. 136.
17 Ass. 6.

Benefit of clergy.

Benefit of clergy, which, as before observed, was regulated by statute in the reign of Edward I., was now kept within the prescribed bounds. If clergy was claimed by a prisoner on his arraignment, a jury was empannelled, *ex officio*, as in the former reigns, to try the fact of clergy, but it seems, that a clerk had not his privilege if he was not demanded, or if he was disowned by the ordinary. A clerk was found guilty of felony, and showed his clerkship by reading, but, nobody challenging him, he was sent to prison; but he was not hanged, for such was not the usual course when a person was found guilty by an inquest *ex officio*. When, however, he chose to stand his trial, rather than suffer an indefinite imprisonment, he was executed, if found guilty as in the case above mentioned.

Reeves' His. iii. 137.

12 Ass. 15. 39.
17 Ass. 42.

Reading seems to have been ordinarily admitted, at this

period, as an evidence of clerkship, but it was expected, agreeably to the statute of Edward I., and the injunction of the king, that the ordinary would challenge no one who was not a clerk.

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It was now become a maxim in criminal proceedings, that a man should not be tried twice for the same offence, wherefore, *autrefois acquit* of the same felony was held to be a good plea to prevent going to trial, provided the defendant could produce the record of the acquittal. Sometimes the plea was *autrefois attaint*, or *autrefois convict* (for there was not as yet any distinction between them), which, after a time, was held to be a good plea to an indictment or an appeal.

Pleas of autrefois acquit, and autrefois attaint.

26 Ass. 15.

44 Ed. 3. 44.

Judgment of felony was not commonly passed on infants, but this would depend on the appearance of capacity in the offender. If a child gave any indication that he or she was sensible of having done wrong, it was held that *malitia supplet ætatem*, as in the case of a girl of thirteen, who was burnt for killing her mistress, in this reign. By a law of Ina, a child ten years old might be punished for theft; but, by a law of Athelstan, he could not be put to death for any offence before the age of fifteen. At the age of twelve he was enrolled in some decennary, and called upon to take the oath of allegiance.

Judgment and execution.

12 Ass. 30.
27 Ass. 40.

LL. Inæ. c. 7.
Jud. Civ. apud Wilk. 66.
Ante, p. 16.

A married woman was, according to the old law, considered as *in potestate viri*, and so privileged in cases of felony. A woman might also plead her pregnancy to respite her execution, but this was not allowed a second time.

Privileges of married women.

Ante, p. 38.
Reeves' His. iii. 126.

The sources of legal information in this reign are the statutes, parliament-rolls, year-books, and some law-tracts.

Sources of legal information.

The statutes of this reign are called *nova statuta*, to distinguish them from the *statuta vetera*. The parliament-rolls contain an ample and satisfactory account of the judicial proceedings of the Peers, and of the petitions of the Commons, many of which gave rise to the statutes, either at this or a subsequent period, as also of the ordinances which were thus distinguished from the statutes. Of these parlia-

Statutes.

Parliament-rolls.

Reeves' His. iii. 147.

ment-rolls, MS. copies are said to be extant in many libraries, besides which they have since been printed by authority of parliament.

Year-books and assizes.

The reports of this reign are comprised in four volumes; the three first under the title of Year-Books, and the fourth under that of Liber Assisarum, being a collection of cases that arose on assizes and other trials in the country.

The first part contains the first ten years in an uninterrupted series, the second part is incomplete, beginning from the 17th year, and ending with the 39th, but not uninterruptedly. From the 23d to the 30th, there is but one term in the year, and from that to the 38th there is an entire chasm.

The third begins with the 40th year, whence it has commonly been called the Quadragesms, and goes on regularly to the end of the reign. The fourth part of Liber Assisarum contains every year regularly through this reign.

Reeves' His. Engl. Law, iii. 129.

These two last parts have been generally preferred to the others, very few cases being abridged from the second part by Fitzherbert and Brookes, and still fewer from the first.

"Besides," says Mr. Reeves, "that questions are there discussed with more precision and clearness, they contain more points of law that have survived to the present times. In regard to precision and clearness, all the reports of this reign excel those of the preceding, but the merit of these volumes is of a peculiar kind, and has a very different appearance from what in later times has been considered as excellent in this way.

Of the writers of these early reports there is no notice whatever, but Plowden says, he has been informed, that they were compiled by four chosen men, who were each allowed an annual stipend by the king.

Bridgman's Leg. Bibl.

At the end of Michaelmas Term 21 Ed. III. 50. These words follow: "Icy se finissent les Reports de Mons. Horewode," and afterwards "Icy s'ensuivent certains Cases pris de hors un autre Report, qui n'ont éte dans les Reports du Mons. Horewode, pas ci devant imprimés."

Notwithstanding the earliest editions of these reports were printed at various times by Pynson, Redman, and others, yet they were so much in request, that one set sold for near 40*l*. They have since been reprinted in different collections, particularly in 1610 and 1697.

Some of the detached cases, not extant, either in the Year-Books, or in the old abridgments, are to be found in the writings of Littleton, Coke, Selden, and some others.

Law-tracts.

This reign has furnished us with three law-tracts, namely, the Old Tenures, Old Natura Brevium, and Novæ Narrationes.

Old tenures. Reeves' His. iii. 151.

The Old Tenures is a small tract, which, as its title denotes, contains an account of the various tenures by which land was holden at that period. Although not very valuable in itself, it has the merit of having led the way to Littleton's famous work on this subject.

This tract was published in 1719, with notes and additions, with the eleventh edition of the first Institutes, and reprinted in 8vo. 1764, by William Hawkins, Serjeant at Law, in a selection of Coke's Law-Tracts.

Old Natura Brevium. Reeves' His. iii. 152.

The Old Natura Brevium, which is so called to distinguish it from Sir Anthony Fitzherbert's Treatise on the same subject, contains the writs then most in use, together with a short comment on the application and properties of each of them.

The first edition of which there is any mention, is that printed by R. Pinson for "his maistres of the company of the Strond Inne without Tempyll Barre off London," in small folio; and another by him in short folio, both without date. Another edition was printed by Redman, with additions and a frontispiece; also another in English and in 8vo., by H. Smith with additions, both without date.

Bridgman's Leg. Bibl.

In 1525 we find, "Old Natura Brevium, Old Tenures, Lyttleton's Tenures, New Tayles, Diversitie of Courts, Justice of Peace, Chartuary, Court Baron, Court Hundrede, Retorna Brevium, and Ordnance for taking fees in the Exchecker, printed in octavo." The same collection was reprinted in the years 1532, 1534, 1538, 1553, and 1574.

Of the French editions, one was in folio printed by Middleton, without date, but supposed to be about 1516; and eight in 12mo., namely, in 1525, 1528, 1529, 1531, 1557, 1572, 1580, and 1584.

Of the English editions there was one in 1528, newly corrected, with divers additions of statutes, booke cases, pleas in abatement of the said wryths and thyre declracions and barres to the same, &c. printed by R. Pinson in 16mo. There were four other English editions in 12mo. in 1553 and 1557, and two in 8vo., one by Redman in 1532, and another by Petyt in 1544.

Wood's Athen. i.

Who was the English translator of this work is not known with certainty; Wood speaks of Thomas Phayer, as having written or translated the Nature of Writs.

Novæ Narrationes.

The collection called Novæ Narrationes consist, for the most part, of declarations, as the title imports, but it contains some few pleadings in actions then in practice. The Articuli ad novas Narrationes, which is frequently subjoined to this work, treats of actions and courts, together with writs, declarations, directions, and precedents.

Co. 2 Inst. 552.

The book on the Diversity of Courts, is also said to have been written in this reign.

Inns of courts.

Temple.

Dugd. Orig. Jur. 145.

Some further additions were made in this reign to the number of Inns. The New Temple, as it was then called, having been granted by Edward III., about 1324, to the Knights Templars; after the dissolution of their order, they are said to have demised it at a rent of 10*l*. per annum to divers professors of the law who came from Thavies Inn, Holborn.

Gray's Inn.

Gray's Inn is also said to have been inhabited at this time by some professors of law, who held it under a lease from Lord Grey de Wilton.

Clifford's Inn.

Hearn's Disc. iii. Dugd. Orig. Jur. 41.

That Clifford's Inn was first established in this reign is ascertained from a demise in 18 Ed. III. from Lady Clifford, *apprenticiis de Banco*, of that house near Fleet-street, called Clifford's Inn.

Ibid. 37.

The Chancery, which, as well as the King's Bench, had

hitherto followed the king, was, in the 4th of Ed. III., settled in Westminster when the king fixed his seat there, and the chancellor, who is said to have held his court at the upper end of Westminster-Hall, sat at a great marble table, to which there was an ascent by five or six steps. The site has since been occupied by the courts erected there.

Dugd. Orig. Jur. 141.

Salaries of the judges.

Dugd. Orig. Jur. 105.

The salaries of the judges underwent some changes in the course of this reign, for we find, that in the 28th of Ed. III. one of the justices had 80 marks, and in the 39th of this king, the judges in that court had 40. In the 36th of Ed. III., the chief baron had 40*l.*, and in the 39th year, the chief justice of the King's Bench had 100 marks, and the other justices 40*l.*

Hist. Chanc. 21.

In the reign of Hen. III. a house had been founded for the reception of convert Jews, the headship had been usually granted to some of the clerks in Chancery, but in the 15th of Ed. III., it was annexed by charter to the keepership of the rolls.

CHAPTER XXI.

RICHARD II.

Statute Law.—Formation of the Navy.—Impressing.—English Shipping.—Exporting Gold and Silver.—Going abroad.—Attendance in Parliament.—The Clergy.—Provisors and Citations to Rome.—Protest of the Clergy.—Purchasing Bulls.—Heretics.—Writ de Hæretico Comburendo.—Statute against Appropriations.—Against Mortmain.—Statute of Labourers.—Going armed prohibited.—Forest and Game Laws.—Statute of Pernors of Profits.—Fraudulent Gifts.—Carrying away Women.—Judicature of the Council.—Suggestions.—Court of Chancery.—Subpœna.—Judicature in Parliament.—Court of the Constable and Marshal.—Court of the Admiral.—Court of Exchequer.—Justices of Assize.—Justices of the Peace.—Sheriffs.—University Courts.—Forcible Entry.—Treason.—Protections.—Escape of Prisoners.—Misdemeanors of Villeins.—Scandalum Magnatum.—Nuisances.—Year-Books.

CHAP. XXI. RIC. II.

Statute law.

ALTHOUGH the feeble and fluctuating reign of the prince was not favourable to the advancement of the law, yet it received several accessions by statute which are entitled to notice.

Navy. Stat. 2 Ric. ii. c. 4. *Impressing seamen.*

The regulation of the navy was one of the first subjects which engaged the attention of Richard. II. From a statute passed in the second year of his reign, we find that the principle of impressing men by the king's commission was recognised as the law of the land. If those who were arrested and retained for the king's service fled, they were, besides forfeiting double what they had taken for wages, to be imprisoned for a year.

For the encouragement of English shipping and increase of the navy, which, as the preamble to another statute complains, was then greatly diminished, it was ordained that the king's subjects should ship no merchandise out of or into the realm, but only in ships of the king's legeance, on pain of forfeiture. This was confirmed and enlarged by several additional regulations in two subsequent statutes.

Shipping and commerce. Stat. 5 Ric. 2. st. 1. c. 3. Stat. 6 Ric. 2. st. 1. c. 8. 14 Ric. 2. c. 6.

Carrying gold or silver out of the kingdom was forbidden, under the penalty of forfeiting all that the offenders could forfeit. This was a measure of general policy, grounded on the king's prerogative, and confirmatory of previous statutes; but it was particularly levelled against the clergy, to prevent them sending money out of the kingdom. All persons were likewise restrained by the same act from going beyond sea without the king's licence, and then it was to be only at certain ports.

Exporting gold and silver. Stat. 5 Ric. 2. st. 1. c. 2. *Going abroad.*

As attendance in parliament was then not so much an object of ambition as it has been since, it was found necessary to enforce it by the infliction of a penalty on absentees who could not honestly excuse themselves to the king. Sheriffs were likewise made finable by the same statute for neglecting to make the returns of parliamentary writs, and for omitting in their returns any cities or boroughs which were bound and formerly wont to come to parliament.

Attendance in parliament. Stat. 5 Ric. 2. st. 2. c. 4.

The claims, the privileges, and the property of the clergy were the subject of several parliamentary enactments. One statute gave prelates and clerks an action of trespass against purveyors, for a breach of any of the statutes in the preceding reign on the subject of purveyance. It also relieved prelates and clerks from vexatious indictments, and exempted priests from arrests while officiating in churches or elsewhere.

The clergy. Stat. 1 Ric. 2. c. 3. 15.

On the other hand, as the practice of making gifts of church benefices, and also suing at the court of Rome, continued, notwithstanding the statutes of *Præmunire* passed in former reigns, these offences were visited with still heavier penalties; imprisonment, forfeiture of lands, tenements, and

Provisions and citations to Rome prohibited. Stat. 3 Ric. 2. c. 3.

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chattels, and, in aggravated cases, loss of life or member. If any prelate made execution of any summons or sentence of excommunication from the court of Rome, against any one for putting in force the statute of Provisors, his temporalities were to be taken into the king's hands until due redress and correction were made therein.

7 Ric. 2. c. 12. 12 Ric. 2. c. 15. 13 Ric. 2. c. 2.

Protest of the clergy. Cott. Abrid. 332. Reeves' His. iii. 165.

These strong measures against the court of Rome being looked upon with some apprehension by the clergy, we find that, towards the close of this parliament, the Archbishops of Canterbury and York, for themselves and the whole clergy of the provinces, made protestation that they in no wise meant, nor would assent to any statute or law made in restraint of the pope's authority, but would utterly withstand the same; which protestation was at their desire enrolled.

Purchasing bulls prohibited. Stat. 16 Ric. c. 5. Parl. Hist. vol. i.

Nevertheless, they afterwards concurred with the laity in the act which subjected to a *præmunire* such as purchased bulls from Rome to prevent the execution of judgments passed in the secular courts respecting advowsons and other matters of an ecclesiastical nature. On that occasion, the Lords temporal declared such an interference to be a violation of the established law of the land; but the Lords spiritual, going further, said, that censures of excommunication against any one, for executing processes of the king's courts, were against the king's crown and dignity.

Stat. 5 Ric. 2. st. 2. c. 5.

Whilst endeavours were thus making to repress the interference of the papal power, it was also thought necessary to check the zeal of those who in their violent opposition to the Romish doctrine, threatened the peace, not only of the church but of the kingdom. The followers of Wickliff are described in the preamble to the statute, as going about from town to town, and under pretence of great holiness, and without the licence of the ordinary, or any other authority, preaching daily in the churches, churchyards, markets, fairs, and other open places, uttering in their sermons heresies and notorious errors. It was also added, that they preached divers matters of slander, to engender discord and dissension between divers estates of the realm. Wherefore it was

enacted, that the king's commission should be directed to the sheriffs and other officers, or other learned persons, in pursuance of certificates from the bishops, to be made in Chancery from time to time, to arrest all such persons, and to hold them in prison until they could justify themselves according to the law and reason of holy church.

Against this provision the Commons protested the next year, declaring, that they meant not to bind themselves or their heirs to the prelates any more than their ancestors, and that therefore they never consented to the law. Their remonstrance had the effect of procuring a temporary repeal of the law.

Reeves' His. iii. Cott. Abrid. 285.

The practice of appropriations on the part of the patrons of churches, that is, of taking the profits of livings into their own hands, and deputing a person upon a scanty salary to perform the duties of the church, was now grown to such a height as to be highly injurious to the interests of religion; for the miserable subsistence of persons so appointed, who were known under the different names of curate, vicar, and capellan, brought both the person and office of the clergy into contempt: wherefore it was enacted that, in every licence to be made in Chancery for the appropriation of a church, it should be expressly contained therein, that the diocesan of the place, upon the appropriation of such church, should, among other things, require that the vicar should be well and sufficiently endowed.

Statute against appropriations. 15 Ric. 2. c. 6.

As the ecclesiastics were anxious to evade the mortmain act, and had hit upon the device of consecrating land for burying ground, and under that pretence of purchasing considerable property in mortmain, it was enacted by a statute in the 15th of this king, that such advice was to be brought within the words of the act, *arte et ingenio*, as also the purchase of lands to the use of those religious houses.

Against mortmains. Stat. 15 Ric. 2. c. 5.

Another of their devices was to get their villeins to marry free women who had inheritances, so that the lands might come to their hands by the right which the lord had over the property of the villein. The Commons petitioned

Cott. Abrid. 355.

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against this contrivance, in the 17th year of this king; but the answer was, that sufficient remedy was provided by the statute.

Statute of Labourers. 12 Ric. 2. c. 3.

To prevent the increase of vagrancy and beggary, the statute of Labourers in the last reign was enlarged by several additional provisions. Among other things, it was enacted, that labourers should not leave the hundred, rape, or wapentake, in which they dwelt, without a letter patent under the king's seal, under pain of being put into the stocks. Those who went about begging, being able to serve or labour, were to be treated as those who departed out of the hundred; and those who were impotent to serve, were to abide in the cities and towns where they were dwelling at the time of the proclamation. Persons going on pilgrimage as beggars, and scholars of the university who travelled in this manner, were also required to have their testimonials; the latter from the chancellor of the university, under pain of being dealt with as vagrants. By another statute, further regulations were made to bring the rate of wages nearer to the price of provisions. Also, to prevent all idle expenses among the lower orders, they were required to leave all playing at tennis or foot-ball, and other games, called quoits, dice, casting of the stone kails, and other such importune games.

Stat. 13 Ric. 2. c. 8.

Stat. 12 Ric. 2. c. 6.

Statute of Liveries. 1 Ric. 2. st. 2. c. 7.

For the preservation of the peace, it was found necessary to suppress the practice, which was at this time very prevalent, of giving liveries to the followers and retainers of great men, which created much party spirit; wherefore it was enacted, that no livery was to be given to any man for maintenance of quarrels and other confederacies, upon pain of imprisonment and a grievous fine to the king. This statute speaks of esquires as being retained in this way; but by another statute the provision is extended to yeomen, and others of a lower estate.

Going armed prohibited. Stat. 20 Ric. 2. c. 1.

For a similar reason, going armed was now restricted by a particular enactment. Lancegaies and armour were declared by the statute to be unlawful. Knights and others

were prohibited from going or riding armed, either by night or by day, except the king's ministers. Furthermore, to prevent disorders, servants and artificers were prohibited from carrying a sword, buckler, or dagger, under pain of forfeiting the same, except in time of war, or when travelling with their masters; but, for the encouragement of the national exercise, they might have bows and arrows, and might use them on Sundays and holidays.

Stat. 12 Ric. 2. c. 6.

Forest and game laws.

Stat. 7 Ric. 2.

In order to render the forest laws as little oppressive as possible, a statute in the 7th year of this king, provided that no juryman should be compellable by any officer of the forest to travel from the place where the charge was given, nor be constrained to give a verdict otherwise than according to his conscience. Neither was any one to be taken or imprisoned by any officer of the forest, without indictment, or being taken with the manour, or trespassing in the forest. This relaxation in the execution of the forest laws, which was probably sought for by the higher orders, opened the door to excesses on the part of the lower classes, which rendered further restrictions upon them necessary. From the preamble to a statute in the 13th year of this king, we find it was the practice for "divers artificers, labourers, servants, and grooms, to keep greyhounds and other dogs, and on the holidays, when good christian people be at church hearing divine service, they go hunting in parks, warrens, and connigries, of lords and others, to the very great destruction of the same; and sometimes, under such colour, they make their assemblies and conferences, and conspiracies, to rise and disobey their allegiance." To remedy these evils, it was ordained, that no artificer, labourer, nor any other layman, not having lands or tenements of 40*s.* per annum, nor priest or other clerk (if not advanced to the value of 10*l.* per annum), should keep any greyhound, hound, or other dog, to hunt; nor use ferrets, keys, nets, hare-pipes, cords, or other engine, to take or destroy deer, hares, conies, or other game, *des gentils*, on pain of a year's imprisonment, to be inquired of by the justices of the peace. Thus did the lords and

Stat. 13 Ric. 2. st. 1. c. 13.

gentlemen succeed in getting those restrictions removed which affected themselves, and in imposing others for the protection of their own lands. "This was," as Mr. Reeves observes, "the first stone in the present fabric of game laws."

Reeves' His. iii. 215.

Statute of Pernors of Profits and Uses.

1 Ric. 2. st. 2. c. 9.

The statute in the preceding reign, which was made against fraudulent gifts, was now confirmed and enlarged by additional enactments. Among other things, it was ordained, that where disseisors made alienations, the disseisees should have their recovery against the first disseisors, without regard to such alienations, provided that such feoffors took the profits.

Fraudulent gifts.

Stat. 2 Ric. st. 2.

Against persons making feigned gifts, and then withdrawing to privileged places, to defraud their creditors, the stat. 2 Richard II. enacted, that in all cases of debt, after proclamation made, execution should be levied on the goods and lands of the debtor in the same manner as if he were out of the privileged place.

Carrying away women.

Stat. 6 Ric. 2. st. 1. c. 6.

To prevent the frequent ravishing, that is, stealing and carrying away women, a statute in the 6th year of this king enacted, that whenever the ravished party consented, she was to be disabled from claiming her dower. Also the husband or father might sue the ravisher, and have judgment of life and member, notwithstanding the consent of the woman; and the defendant was not permitted to wage battle, but the truth was to be tried by the country.

In regard to the administration of justice, several enactments were made which affected the jurisdiction of courts.

Judicature of the council.

Cott. Abrid. 162.

The Commons renewed their petitions against the judicature of the council, praying that no man should answer before the council, by writ or otherwise, concerning his freehold, but only at common law; to which it was answered, that no man should be forced finally to answer there on such matters, though they should be obliged to answer concerning oppressions. As this did not give full satisfaction, a statute was passed in the 17th year of this king, to prevent false suggestions, authorizing the chancellor, upon any suggestion

Stat. 17 Ric. 2. c. 6.

being found and proved untrue, to award damages, according to his discretion, to the person injured.

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Court of Chancery.

By this act, it is evident that the jurisdiction of the Chancery was extended so as in a great measure to supersede the judicature of the council; from which it emanated. Although no express mention is made of a court of equity at this time, yet from what has already been hinted at, at an earlier period, and the exalted nature of the chancellor's office and dignity, there can be little doubt but that he took upon him to decide, either in the council or by his sole voice, in judicial matters that were not cognizable at common law. It is also clear, that so long as he kept within these limits, his jurisdiction was not an object of jealousy. The Commons, in the 13th year of this king, prayed that the chancellor might make no order against the common law; and on another occasion, that no one should appear before the chancellor, where recovery was given by the common law. In both which cases the answer of the king was to the same effect, that it should continue as the usage had been heretofore; from which it may be inferred, that the authority of the chancellor had heretofore been exercised in modifying the rigours, or supplying the defects of the common law, and that so long as he kept within these bounds, this was recognised by the Commons as a part of his jurisdiction.

Rot. Parl. 13 Ric. 2.

As to the exact period when the chancellor was invested in a formal manner with this part of his high office, it is not possible to speak with any certainty. It is most probable that his jurisdiction, like many other parts of our jurisprudence, was the slow and silent work of time and circumstances; but it is generally admitted that it was enlarged in this reign by other accessions besides that above mentioned. The first use of the writ of subpœna in Chancery is ascribed to John Waltham, bishop of Salisbury, who was keeper of the rolls about the 5th of this king. By this writ the party was summoned to appear and answer such things as should be objected to against him, upon which a petition was lodged containing the articles of complaint, to which he was then compelled to answer.

Writs of subpœna in Chancery.

Rot. Parl. 3 Hen. 5.

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Reeves' His. iii. 192.

These articles contained suggestions of injuries for which there was no redress at common law. This process was most probably adopted, and not invented, by the chancellor; for a similar process is referred to by the Commons, who, in their petitions in the preceding reign, complained that persons were brought before the king's council by writ and otherwise, upon grievous pain, contrary to law, that is, contrary to the common law.

Butler's Hor. Sub. 66.

The equitable jurisdiction of the Chancery is supposed to have been suggested by the practice of the Romans, whose pretors were authorized to pronounce equitable decisions, not to the extent of abrogating or altering laws, but to that only of tempering them with equity, so as to render them more effective, their edicts forming a part of the code of civil law. Probable, however, as this conjecture may be, it must be borne in mind, that this judicial power of the chancellor was no other than what had been exercised by our kings at an early period, who had been used to moderate the judgments of other courts by their equitable decisions. It is not therefore surprising to find this power delegated to an officer who had already stood in so intimate a relation with the king.

Ante, p. 26.

Judicature in parliament.

Tyrr. Hist. iii. 834.

State trials.

The judicial proceedings in parliament were in this reign so irregular as scarcely to deserve notice in tracing the progress of English Law. Notwithstanding the decision of the peers in the preceding reign, it appears that they took upon them to try Alice Peers by the verdict of a jury. So likewise, in a case of appeal, when the Archbishop of York, the Duke of Ireland, Michael de la Pole, Earl of Suffolk, Robert Tresilian, and Sir Nicholas Bramber, the ministers of Richard, were the appellees, on a charge of high treason; they were not permitted to wage their battle, according to the course of the common law; but were condemned by the Peers, without any form of a trial. The Commons were also not backward in making use of their newly-acquired right of impeachment in this troublesome reign.

Court of the

The court of the Constable and Marshal is incidentally

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Constable and Marshal.

mentioned in the preceding reign, from which we gather that appeals for treason and matters of war were therein heard and determined. In this reign, we find that exceptions were taken to its jurisdiction, on the score that it was governed by the law of arms, and not by the custom of the realm. It was stated as a grievance by the Bishop of Saint David's, in the speech usually made at the opening of the parliament, in the 2d year of this king, that the law of arms and the law of the land did not agree. The Commons also petitioned, in the same parliament, that the Constable and the Marshal might surcease from holding pleas of treason or felony, which were to be determined on before the king's justices. To obviate these inconveniences, the jurisdiction of this court was now defined by statute, which enacted that no plea that concerned the common law should be tried before the Constable and Marshal. That this court was to have cognizance of contracts, touching of deeds of arms only, which could not be determined nor discussed by the common law. It moreover provided, that if any one complained that a plea was commenced before the Constable and Marshal which might be tried by the law of the land, the complainant might have a privy seal of the king without difficulty, directed to the Constable and Marshal, to surcease in that plea, until it was discussed before the king's council, whether the matter belonged to the common law or to this court.

Co. 4 Inst. 123.
48 Ed. 2.
Cott. Abrid. 171.

Stat. 8 Ric. 2. c. 5.

By the criminal jurisdiction of this court, it took cognizance of appeals of death or murder, as also of the offences and misconduct of soldiers, contrary to the laws of war. The proceedings of this court were according to the course of the civil law, but the laws by which it was guided were grounded solely on the prerogative of the king, by whom they were made. "For," as Sir Matthew Hale observes, "preparatory to an actual war, the kings of this realm, by advice of the Constable and Marshal, were used to compose a book of rules and orders, for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; of which military laws there are examples

Hale's Hist. Com. Law, c. 2.

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to be seen in the black-book of the Admiralty, particularly of those composed by this prince, with the advice of the Duke of Lancaster and others.

Hale's Hist. Com. Law, c. 2.

The criminal jurisdiction of the Constable and Marshal, might not, before this statute, be exercised in times of peace, when the king's courts were open to all to receive justice, according to the laws of the land. This is expressly stated in a record of the case of the earl of Kent, who, being condemned in the 15 Ed. II., in a kind of military court, by a summary proceeding, his judgment was reversed in the reign of Ed. III. on the ground that the offence of which he stood charged, had been committed in time of peace, and when the standard of the king was not unfurled.

Court of the Admiral.

The court of the Admiral was another jurisdiction of which we have only incidental mention before this reign; although there is no doubt that as the navy had been an object of great concern with our kings from the time of Alfred, there had been some officer invested with judicial powers to determine naval matters. The name admiral, in low Latin *admirallus*, from the Greek αλς, the sea, and the Arabic *emir*, a governor, was probably given to this officer at the time of the crusades. In records as early as the reign of Edward I. he is styled *admirallus, custos maris, capitaneus nautarum, &c.*; and his office, which is mentioned in records of the reign of Henry III. was, in all probability, coeval with the introduction of the laws of Oleron. It was at first not conferred on one individual, but a certain extent of jurisdiction was assigned to each individual, to be held at the king's pleasure or for life, as might be. Sometimes one man was invested with the whole power. In the reign of Ed. I. William de Leybourne was created admiral of all England. From a case of replevin, heard in the Common Pleas, in the reign of Edward I., for taking a ship on the coast of Scarborough, we gather that that was called the sea which was not within the body of any county whence a jury might come; and that the sea not being within any county, was not within the jurisdiction of the Common Pleas, but belonged to the

Co. 4 Inst. 144, 145.

Ibid.

admiral's jurisdiction; also, that when a ship came within the river, then it was confessed to be within the county; and that when a taking was partly on the sea and partly on the river, then the common law should have the jurisdiction.

The first particular mention of this court was in this reign, when, to allay the jealousies which the admiral's authority created in the port-towns, who had franchises of their own, it was now thought necessary to define his jurisdiction. The preamble to the first statute passed for this purpose states, that complaints had been made that admirals and their deputies held their sessions within divers places of the realm, as well within franchises as without, accroaching to them greater authority than belonged to their office, to the prejudice of the king and the persons possessed of those franchises; wherefore it was enacted that admirals should intermeddle only with things done on the high sea, as in the time of Edward III. By another statute, the jurisdiction of the admiral was more nicely defined. The order of proceeding in this court was according to the course of the civil law.

Stat. 13 Ric. 2. st. 1.

Stat. 15 Ric. 2. c. 3. Duck. de Ortu et Prog. Civ. Leg. 356.

Court of Exchequer.

In consequence of complaints against the dilatory proceedings in the court of Exchequer, several provisions were made by the legislature to remedy the evils. Among other things, the heirs and executors of persons who had accounted at the Exchequer were allowed to plead the discharge of the ancestor or testator, without the necessity of having, as heretofore, a writ of privy seal, authorizing them so to do. Besides, all parties were permitted to plead in this court in the same manner as in the other courts.

Stat. 1 and 5 Ric. 2.

Justices of Assize.

Stat. 8 Ric. 2. c. 2. 20 Ric. 2. c. 3.

In order to ensure the impartial administration of justice throughout the realm, some wholesome enactments were made in the 8th and 20th years of this king. The substance of the oath enjoined by the statute in the 18th year of the late king was re-enacted; besides which, it was ordained, that if any judge was convicted before the king or his council of making a false entry, rasing any roll, or changing any verdict, he should be punished at the discre-

tion of the council. It was also ordained, among other things, that no man should be justice of Assize or Gaol Delivery in his own county, and that lords and other great men should not sit with the justices to take assizes at the sessions.

Justices of the peace. Stat. 12, 13, 14, and 17, Ric. 2.

The authority of justices of the peace was greatly enlarged in this reign by several statutes, which regulated the time and manner of holding their sessions, prescribed the qualifications of the persons proper to fill the office, and specified the matter which should fall within their jurisdiction, in confirmation of former statutes on the same subject.

Sheriffs.

The appointment of the sheriffs was regulated in affirmance of the statute, in the 14th year of the late king, with the additional provision, that the chancellor, treasurer, keeper of the privy seal, and all other that should be called to ordain, name or make justices of the peace, sheriffs, escheators, and other officers of the king, were to be sworn not to ordain any such for gift or brocage, favour or affection; but, to make all such officers and ministers of the best, most lawful, and most sufficient. It was moreover ordained, in confirmation of the abovementioned statute of Edward, that none who had been sheriff of any county for a year, was to be chosen again for three years, provided any other fit and sufficient person could be found.

Stat. 1 Ric. 2.

University courts. Duck. de Ort. et Prog. Civ. Leg. 348.

By the charter of this king were established the courts of Oxford and Cambridge, where pleas of debt, contract, and trespass within the universities, were heard and determined. In the libels, examination of witnesses, and all other judicial forms of proceeding, these courts followed the course of the civil law.

Forcible entries. Stat. 5 Ric. 2.

In regard to the remedies for redress of injuries, it was enacted, by a statute in the 5th year of this king, that in cases of disseisin, when by the old law the party disseised might make forcible entry, such redress should not for the future be allowed; and, if the disseisee entered with force, he was punishable as a disseisor. A further enactment was made on the same subject in the 15th year of this king.

Stat. 15 Ric. 2. c. 2.

The liberty of laying the *venue* at the pleasure of the plaintiff had, as may be supposed, been abused by some litigious persons, who, bringing their actions in a foreign county, obliged defendants to go with their witnesses to a great distance; wherefore, to remedy this evil, the statute in the 6th year of this king ordained, that in actions of debt, account, and other personal actions, if the declaration stated the contract to be in any other county than that contained in the original writ, the writ should be immediately abated.

Venue. Gilb. C. P. 89. Stat. 6 Ric. 2. st. 1. c. 2.

The law of treason underwent some alteration in this reign, in order to meet the riots and commotions, which prevailed to such a degree as to endanger the safety of the state; wherefore it was enacted, that if any made or began any manner of riot and rumour, or the like, he was to be dealt with as a traitor. This statute was passed in reference to the villeins, who were now become a disorderly class of subjects, and wished to use the liberty they had got in order to obtain still further privileges from their lords. At the same time, as many of these villeins set up claims to certain privileges, which had been enjoyed by their ancestors at the time of the Conquest, a commission was appointed to inquire into the grounds of their pretensions.

Treason. Stat. 5 Ric. 2. st. 1. c. 6.

Misdemeanors of villeins.

In consequence of the disturbances of this reign, another statute was passed on the subject of spreading false rumours, which we have seen was punishable at common law, and also by statute. The act of this reign has since been known by the name of *Scandalum Magnatum*, because it was particularly directed against such as spread rumours derogatory to peers and great men.

Ante, p. 39. Stat. West. 1 Ed. I. c. 34.

Scandalum magnatum.

To prevent the abuses of protections and pardons, which continued to be the subject of complaint in the petitions of the Commons, further provisions were made by a statute, tending to restrict the prerogative of the crown in this particular. Also the laws against maintenance were strongly enforced.

Protections. Stat. 13 Ric. 2. c. 16.

Stat. 1 Ric. 2. c. 4.

As prisoners in custody upon a judgment were frequently let at large by the warden of the Fleet, and that without

Stat. 1 Ric. 2. c. 12.

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bail or mainprise, this officer was now prohibited from so doing, on pain of losing his office.

Nuisances. Stat. 12 Ric. 2.

Public nuisances were now, for the first time, the subject of legislative enactment, which prohibited the throwing of offal and other offensive things into the streets and ditches, under a penalty of forty shillings.

Year-books. Hale's Hist. Com. Law, c. 8.

Of this reign there is no year-book extant, although Sir Matthew Hale informs us, that he had seen the entire years and terms thereof in a MS. out of which he supposes Fitzherbert to have abstracted the broken cases of this reign in his abridgment.

CHAPTER XXII.

HENRY IV.

Succession to the Throne.—Privilege of Parliament.—Heretics.—Writ de Hæretico comburendo.—Statute of Provisors.—Appropriations.—Abuses of Elections.—Grants of the Crown.—Multiplication.—Statute of Labourers.—Judicature of the Council.—Court of Chancery.—Court of the Constable and Marshal, Steward and Marshal, and of the Admiral.—Attornies.—Fees of Court.—Fines.—Sheriffs.—Qualifications of Jurors.—Assizes.—Appeals in Parliament.—Provors.—Benefit of Clergy.—Treason.—Trial of a Peer.—Actions upon the Case.—Principals and Accessory.—Fresh Arraignments for the same Offence.—Peine forte et dure.—Year Books.

CHAP. XXII.

HENRY IV.

THE reign of Henry IV. furnishes the legal historian with some few particulars from the acts of parliament and the decisions of courts.

Succession to the throne.

As this king had come to the throne by a doubtful title, he sought to strengthen it by an appeal to parliament, and thus established the right of parliament to regulate the succession when the occasion called for it. A statute in the 7th year of this king ordained, that the inheritance of the crown and realms of England and France, and all other the king's dominions, shall be set and remain (*soit mys et demuerge*) in the person of our sovereign lord the king, and the heirs of his body issuing.

Stat. 7 Hen. 4. c. 2.

Privilege of parliament.

As the ancient privilege, which exempted members of parliament and their servants from arrest, had not been duly observed, it was prayed in parliament, that whoever arrested a knight or burgess, or his servant, should be fined at the

Cott. Abrid. 433.

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Stat. 5 Hen. 4.

king's mercy. To which petition answer was made, that there was sufficient remedy for this already. Nevertheless it was thought necessary, as a further protection to members and their servants, to enact a punishment for the offence of assaulting, beating, or wounding, any menial servant of a knight or burgess.

Heretics. Ante, p.320.

Although the statute made against heretics in the preceding reign was repealed, yet the spread of these people, under the name of Lollards and others, became so alarming as to render the interference of the legislature necessary for the suppression of their meetings, which are described in the preamble to the statute, as confederacies to stir up sedition and insurrection. Among other regulations, it was ordained that if persons, sententially convict, refused to abjure their opinions, such persons were to be left to the secular arm; and in such cases evidence was to be given to the diocesan or his commissary, and the sheriff, mayor, and bailiff, was, after sentence promulgated, to receive them, and, in a high place, before the people, to cause them to be burnt. By this statute, authority was given to the bishop to direct execution without the writ *de hæretico comburendo*.

Stat. 2 Hen. 4. c. 15.

Writ de hæretico comburendo.

It has been doubted by some, whether the writ *de hæretico comburendo* was a common-law process, or whether it was given by this statute; but the former supposition is the more probable of the two; because the punishment of heretics by burning has already been shown from different authorities to have been the law of England, as it was that of other countries, at an early period.

Ante, p.301. Co. 3 Inst. 43.

Cott. Abrid. 62.

The Commons prayed, in the 11th year of this king, that persons arrested under this statute might be bailed, and make their purgation, and that they might be arrested by none but sheriffs and lay officers; but this petition was not granted: and, on the other hand, when the prelates wanted to increase the rigour of this statute, and exhibited a bill to this effect, it was rejected.

Ibid. 407.

Statute of Provisors.

Papal interference was still further restrained by an addition to the statute of provisors, which made all persons

purchasing bulls of exemption from tithes, chargeable with them in the same manner as if they had not been purchased.

2 Hen. 4. c. 3, 4. 7 Hen. 4. c. 8.

Appropriations. Vicars.

For the regular maintenance of the clergy, it was enacted, in confirmation of the statute respecting appropriations in the last reign, that a secular person was to be appointed perpetual vicar in churches so appropriated. Whence vicars, being regularly instituted and inducted, obtained the same claim as parsons.

Stat. 4 Hen. 4. c. 12.

Abuses of elections.

The right ordering of the elections of members of parliament was now beginning seriously to engage the attention of the legislature. Sheriffs, either from carelessness or wilful neglect, had been guilty of many irregularities, which were partially the subject of a statute in the preceding reign. In confirmation of this, it was now enacted, that knights of the shire were to be elected *in pleno comitatu*; and as it had been complained of, that sheriffs had taken upon them to summon only such freeholders as they pleased, the statute directs that the knights were to be freely and indifferently elected by all suitors present, whether summoned or not. In order to enforce the due observance of this statute, justices were empowered to inquire of offences of sheriffs in this particular; and if a sheriff was found to make a return contrary to the act, he was to be fined 100*l*.

Stat. 7 Hen. 4. c. 15.

Stat. 11 Hen. 4. c. 2.

Grants of the crown.

Stat. 1 Hen. 4. c. 6.

The king's grants having been sometimes obtained by misrepresentation, and in consequence bestowed on unworthy persons, it was enacted, in the 1st year of this king, that all those who demanded lands, tenements, rents, offices, annuities or other profits, were to make express mention in their petitions of the value of the thing, and also of such things as they before had of the crown; and, in failure of so doing, the grant was to be void. By a subsequent statute, the king excepted all confirmations and licences made by himself, which were not to be void, though the petition did not mention the value; but, by another statute, the king declared, among other things, that he would make grants to none but such as deserved them.

Stat. 2 Hen. 4. c. 2.

Stat. 4 Hen. 4. c. 4.

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Multiplication. Stat. 5 Hen. 4. c. 4.

The notion of transmuting metals into gold, which was known by the name of Multiplication, was become a source of fraud and imposition at this time, which called for the interposition of the legislature; wherefore it was enacted, that any one who multiplied gold or silver, or used the craft of multiplication, and was attainted thereof, should incur the pain of felony.

Statute of Labourers. 7 Hen. 4. c. 17.

By an addition to the statute of Labourers, servants and labourers were restricted in the privilege of putting their children as apprentices; no one being permitted to put his son or daughter apprentice to any craft or labour, within a city or borough, except he had land or rent to the value of 20*s*. per annum. Any person taking an apprentice contrary to this act was to be fined 100*s*.

Judicature of the council. Stat. 4 Hen. 4. c. 23.

Complaints against the jurisdiction of the council continued to be made, on the ground, that after judgments given in the courts, the parties were sometimes compelled to appear before the king or the council; wherefore it was enacted, that after judgment given, the parties and their heirs should continue in peace, until judgment was undone by attaint or error, according to the old law. This was evidently nothing but a confirming and defining the established practice, in order to allay the apprehensions and remove the jealousies of those who thought themselves aggrieved by writs of error.

Courts of Chancery and Exchequer. Cott. Abrid. 410. 422. Ibid. passim.

The proceedings in the Chancery and Exchequer also afforded matter of jealousy and discontent. The writ of subpœna mentioned in the last reign, was now come into such regular use, in the Exchequer as well as Chancery, as to excite the apprehension of the Commons, who prayed that no writ of subpœna might issue out of the Chancery or Exchequer; and another time it was prayed, that the statute about suggestions might be observed. It does not appear that any notice was taken of either of these petitions, for we find more examples of the judicial powers of both these courts than had been before mentioned. As respects the chancellor, his jurisdiction was enlarged by two statutes in

this reign. The first of these gave him a power in the case of infants, in consequence of children having been decoyed from their parents by the monks and friars into religious houses. In such cases, where the common law afforded no remedy, a statute was made empowering the chancellor, on complaint and proof of such abduction, to send for the superiors, and punish them according to his discretion. By another statute, the chancellor was authorized to grant a special assize to persons aggrieved by false entry on lands, or false possession of goods; and, if they recovered, they were to have treble damages.

Stat. 4 Hen. 4. c. 17.

Stat. 4 Hen. 4. c. 6.

Exchequer.

As all the proceedings of the Exchequer were for the benefit of the king, it is not surprising to find, that it should have an equitable jurisdiction similar to that which resided in the council, and that it should pursue the same process by subpœna. The Chancellor of the Exchequer is an officer mentioned by that name as early as the reign of Ed. I.; and, as an equitable jurisdiction appears to have been from the beginning associated with this office, it is naturally inferred that there has been a court of equity in the Exchequer time out of mind.

Co. 4 Inst. 119.

Courts of the Steward and Marshal, of the Constable and Marshal, and of the Admiral.

The courts of the Steward and Marshal, and of the Constable and Marshal, were the subject of frequent petitions, that they might be kept within the bounds of their several jurisdictions, but it produced no statute. The Commons were, however, more successful in regard to the court of the Admiral; for, in consequence of complaints that this court did not observe the statute passed in the last reign defining its jurisdiction, it was now expressly enacted, in confirmation of that statute, that whoever felt himself aggrieved by a breach thereof, might have an action on the case against him who sued in the Admiral's Court, and recover double damages. Besides, the offending party was to forfeit ten pounds to the king.

Stat. 2 Hen. 4.

Attornies.

One of the most important measures, connected with the administration of justice, was that of putting the names of attornies on the roll; which, in consequence of their increas-

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ing numbers, was now found necessary. Wherefore, it was enacted, that for the better assurance of their being duly qualified, they were to be examined by the justices, and by their discretions their names should be put in a roll. They were required to be good and virtuous, and of good fame; and, on being received, were to be sworn well and truly to serve in their offices. It was moreover ordained, that no steward, bailiff, nor minister of lords of franchises, having return of writs, should be attorney in a plea within the franchise.

Stat. 4 Hen. 4. c. 18.

Ibid. c. 19.

Fees of court. Stat. 2 Hen. 4. c. 8. 10. 23.

The fees of the courts, as those of the marshal, of the chirographer, of the clerk, and the like, were now regulated by statute. It was also found necessary, in order to prevent the embezzling of writs on which fines were levied, to enact, that all the proceedings on fines, both previous to, and at the acknowledgment thereof, should be enrolled of record in the court of Common Pleas.

Fines. Stat. 5 Hen. 4. c. 14.

Sheriffs. Stat. 4 Hen. iv. c. 5.

In confirmation of previous statutes, on the proceedings of sheriffs, it was enjoined upon them to abide in their bailiwick, and not to let it to any one, which was henceforth to form a part of their oath.

Qualification of jurors. Stat. 11 Hen. 4. c. 19.

Notwithstanding the qualifications of persons to serve on the grand jury had hitherto engaged so much of the attention of the legislature, improper persons still found means to be put on the inquests to make presentments; wherefore, it was enacted, in the eleventh year of this king, that no indictment should be made but by inquest of the king's lawful liege people.

Assizes.

For the more speedy remedy of injuries done, by those who got possession by forcible entries or otherwise, we have seen that the chancellor was authorized to grant special assizes. As a further remedy, in cases of disseisin, the disseisee was now allowed to bring his assize at any time during the disseisor's life, if the latter took the profits. This was an extension of the time previously prescribed by stat. 13 Ric. II., which only allowed the disseisee to bring his assize within a year next after the disseisin. As to other real writs, the demandant was still to commence his suit within the

Stat. 4 Hen. 4. c. 7.

Reeves' Hist. iii. 230.

year against the person who was tenant of the freehold; if such person took the profits, whence such statutes acquired the name of statutes of pernors of profits.

Appeals in parliament. Stat. 1 Hen. 4.

By a statute in the first year of this king it was ordained, that all appeals of things done within the realm should be tried by the good laws of the realm, and appeals of things done out of the realm, before the constable and marshal of England. This act was passed to prevent the irregular appeals in parliament, which had been brought against lords and others in the preceding reign. The appeals here referred to were the accusations of private persons. "The act," observes Sir Matthew Hale, "is general, extending not only to appeals of treason and felony, but to those of other crimes and misdemeanors; but impeachments were not restrained by this statute, because an impeachment is made by the body of the House of Commons, which is equivalent to an impeachment *per corpus regni*, and is therefore of another nature than an accusation or appeal."

Hale's Hist. Com. Law, c. 3.

Provors. Stat. 5 Hen. 4. c 2.

As notorious felons now often turned provors in order to obtain their deliverance, and afterwards became more notorious than they were before, it was enacted in the 5th year of this king, that if any person sued for a pardon to be granted to a provor, his name should be inserted in the charter with the mention that it was granted at his instance; and if the provor afterwards became a felon, the person suing the pardon was to forfeit 100*l*.

Benefit of clergy.

The words "insidiatores viarum et depopulatores agrorum," which had, in the first instance, been applied to the Lollards, were now frequently introduced into indictments in other cases, so as to preclude the indicted from the benefit of clergy, to which they would otherwise have been entitled; wherefore, to remedy this inconvenience, it was ordained, that these words should be no more used, so as to prevent any person from having the privilege of holy church.

Stat. 4 Hen. 4. c. 2.

Treason. Stat. 1 Hen 4. c. 1

The statute of treason in the preceding reign being complained of, as incurring divers pains, insomuch that no one

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knew how he ought to behave himself, to do, speak, or say, for doubt of such pains; it was the first act of this king's reign, to repeal the abovementioned statute, and revive the statute of Ed. III.; but, as the principal object of that statute of Richard II. was the suppression of riots, it was found necessary to provide a remedy for these evils; wherefore, it was enacted, that when any riot, assembly, or rout of people, against law, was made, the justices of the peace, or two of them, with the sheriff and undersheriff, were to come with the power of the county, the *posse comitatus*, and to arrest them, and then record what they found done in their presence against the law, by which record the parties were to stand convicted, as in the manner provided by the statute of forcible entries.

Stat. 13 Hen. 4. c. 7.

Trial of a peer.

Co. 4 Inst. 58.

1 Hen. 4. 1.

The year-books of this reign furnish the first example of the trial of a peer by the House of Lords. Heretofore the office of lord high steward had been hereditary, and enjoyed by the earls of Leicester, but at this period we find that it was only granted *hac vice*. Accordingly, on an indictment of treason, found against a peer in the first year of this king, a commission was granted to an earl, appointing him to the office of Steward of all England, and commanding all lords to attend, and the constable of the Tower to bring his prisoners before him. The trial was held in Westminster-Hall, where the steward was seated under a cloth of state; the lords being seated down the hall on each side, and the judges round the table in the middle.

Reeves' His. iii. 246.

The justices then delivered in the indictment, which being confessed, on that occasion, judgment was accordingly given; but had it been otherwise, we are informed, that the steward would have asked all the lords, beginning with the lowest, their opinion upon their conscience, without administering an oath.

From the decisions of the courts we gather, that actions on the case, or actions of trespass on the case, as they were commonly called, were now getting more and more into use. An attempt was made to apply this remedy to the cases of

Reeves' His. iii 243.

2 Hen. 4. 3.

assumpsit, but the court was not at present prepared to admit of this novelty; wherefore, in an action against a carpenter, *quare cum*, &c. *assumpsisset*, &c. to build a house within a certain time, and had not done it, it was objected that this was in covenant; and as no writing was shown the action must fail. On this objection the cause was dismissed, and a similar cause was lost on the same ground, in the 11th year of this king.

Reeves' His. iii. 246.

Thus it appears, that at present such as had made agreements without deeds (for a mere writing could not be declared on in covenant), where nothing had been done to execute the contract, were altogether without redress.

Principal and accessory. 7 Hen. 4. 27. 35.

From some cases in the books, on the subject of principal and accessory, it appears to have been held by lawyers, that a person who was present, aiding and abetting in a murder, was a principal, which was in conformity with the old Saxon law, but differed in some measure from the doctrine laid down in the time of Edward III.

Ante, p. 307.

Fresh arraignments for the same offence. 9 Hen. 4. 2.

A person once acquitted, was not to be arraigned again for the same offence, unless the first arraignment was either without an original or with a bad one, when he might be arraigned afresh at the suit of the king. But if the original was good, he could not be arraigned again though the mesne process was bad.

Standing mute. 8 Hen. 4. 1.

If a person, charged with felony, stood mute, it had now become the regular practice to empannel a jury, *ex officio*, to try whether he stood mute of malice, or from infirmity. This precaution was become the more needful, as the punishment inflicted on the offence of standing mute had increased in severity. The punishment was now called *peine* instead of *prisone*. The parties on whom it was inflicted were to lie in a dungeon, nearly naked, with heavy weights on their breast until they were dead, which appear to have been all additional circumstances of severity since the reign of Edward I.

Peine forte et dure.

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Year-books.

The year-books of this reign proceed in an uninterrupted series, besides which there are many cases to be found in Jenkins and Beloe. In the opinion of Sir Matthew Hale, these reports do not display so much learning in the judges, nor so much acuteness in the pleaders, as those of Edward III.

CHAPTER XXIII.

HENRY V.

Elections.—Coinage.—Truces and Safe-conducts.—Letters of Marque.—Dower.—Heretics.—Præmunire.—Clergy.—Ecclesiastical Jurisdiction.—Statute of Additions.—Statute of Jeofails and Amendments.—Certiorari.—Justices of the Peace.—Jurors.—Bailiffs.—Riots.—Flying Process.—False Indictments.—Forging Deeds.—Year Books.

THE English law experienced but few changes from any quarter in this warlike reign; those worthy of notice were effected by parliamentary enactments.

Elections. Stat. 1 Hen. 5. c. 1.

The first act of this king was, to determine the qualifications of persons to be elected as members of Parliament, as also those of the electors, both which were points of increasing importance; knights of the shire were not eligible unless resident within the shire the day on which the writ of summons was dated, nor were any to choose those knights, but such as were also residents. This law was, in like manner, extended to citizens and burgesses of cities and boroughs.

Coinage. Stat. 3 Hen. 5. st. 1. c. 1.

On the subject of the coinage, the statutes of former reigns against the introduction of foreign money were enforced and enlarged. Galley halfpence, and the money called Suskines and Doitkines, and all manner of Scottish silver, were to be put out and not to be current in future, for any payment in the realm of England.

Snelling's Coin. p. 18.

The galley halfpence was the money brought by the Venetians in their gallies, which had been frequently prohibited. The suskine was the Flemish seskin, or piece of six mites; the doitkine was the Dutch duitkin of two penningens.

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Stat. 3 Hen. 5. st. 2. c. 6.

As some doubt had been entertained, whether clipping, filing, and washing the money of the land, ought to be judged treason or not, as no mention is made of it in the statute of Treason, 25 Ed. III., this doubt was now removed by bringing it under the crime of treason.

Truces and safe-conducts.

Two points, effecting the prerogative of the crown, were now for the first time made the subject of two statutes, namely, breaches of truces, and safe-conducts, and letters of marque.

Stat. 2 Hen. 5. st. 1. c. 6.

In consequence of the many disorders which were committed during a truce, on persons having the king's safe-conduct, as well on the main sea as within the ports and coasts of England, Ireland, and Wales, the breaking of truces and safe-conducts, or abetting and receiving the truce-breakers, was declared to be high treason against the king's crown and dignity. For putting this statute into force, conservators of truces and safe-conducts were appointed in every port, and empowered to hear and determine all such treasons committed on the main sea out of the body of the country. Two persons, learned in the law, were to be associated in every commission with the conservator.

Co. 4 Inst. 152.

Letters of marque. Stat. 4 Hen. 5. c. 7.

In regard to letters of marque it was enacted, by a subsequent statute, that if any subject was aggrieved against the tenour of any truce between the king and his enemies, he might complain to the keeper of the privy seal, who was to make out letters of request; and if, after such request made, the party required did not make, within a convenient time, due restitution or satisfaction to the party grieved, then the chancellor was to make out letters of marque, under the great seal, for the party grieved.

Dower. Hargrav. Co. Inst. 31.

By the common law, women aliens were not dowable; but Sir Matthew Hale quotes an act of parliament in this reign not in print, whereby it was enacted, that all women aliens, who should be married to Englishmen by licence of the king, should be enabled to demand their dower after the death of their husbands, in the same manner as English women.

Heretics.

The Lollards being considered at this time as the princi-

pal disturbers of the peace, not only of the church, but of the whole kingdom, uniting, as the preamble to the act states, in confederacies, to destroy the king and all other estates of the realm, it was enacted, that the chancellor, treasurer, justices, sheriffs, mayors, and bailiffs, of cities and towns were, on entering their office, to take an oath that they would use their whole power and diligence to destroy all heresies and errors, commonly called lollardies, and assist the ordinaries and their commissaries, as often as required by them. In addition to the penalties already inflicted on such offenders, they were now to suffer forfeiture of goods and lands, as in case of felony; but no heretics were to forfeit their goods till they were dead.

Stat. 2 Hen. 5. st. 1. c. 7.

Præmunire.

Stat. 3 Hen. 5. c. 4.

On the other hand, the laws against provisors, provisions, and pardons, were now confirmed and enlarged by some severe provisions against such offences. The penalties of *præmunire* were imposed on persons obtaining provisions or pardons contrary to the statute in the last reign.

Clergy.

Stat. 1 Hen. 5. c. 7.

Stat. 2 Hen. 5. st. 2. c. 2.

Stat. 2 Hen. 5. st. 1. 4 Hen. 5. c. 8. 10.

In regard to aliens holding benefices, which was prohibited by stat. 13 Ric. II., an exception was made in favour of alien priors, provided they were Catholic, and found sureties not to disclose the secrets of the realm. By another statute the salaries of curates and chaplains were fixed, the former at eight marks per annum, and the latter at seven. By another, the ordinary was empowered to inquire into the government of hospitals, and reform abuses; and by a third, the fees for the probate of wills were regulated.

Ecclesiastical jurisdiction.

Stat. 2 Hen. 5. st. 1. c. 3.

In consequence of complaint having been made, that ecclesiastical courts took cognizance of matters touching freehold and the like, which properly belonged to the king's courts, and denied the party the libel on his demanding it, whereby he was deprived of his remedy at common law, a stop was put to this inconvenience by requiring the ecclesiastical courts to deliver the libel, as soon as it was grantable by law, to all parties sued in that court, on their demanding it; in order that they might be informed whether to answer thereto or to purchase a prohibition.

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Statute of Additions.
1 Hen. 5. c. 5.

Among the provisions which were made for amending process, one statute, afterwards called the statute of additions, is particularly worthy of note. This was passed to give full efficacy to the writ of *idemptitate nominis*, which was prescribed by the stat. 37 Ed. III., in cases where persons, not outlawed, were taken as such, in consequence of their having the same name as the real outlaw. Wherefore, it was now enacted, that in every original writ of actions, personal appeals, and indictments, in which the exigent was to be awarded to the names of the defendants, additions were to be made of their estate, degree, or mystery, and of the towns or places in which they were conversant.

It was also provided by this statute that, although the writs in actions personal were not according to the records and deeds by the surplusage of the forementioned additions, the writ should not be abated on that account.

Statute of Jeofails and Amendments.
9 Hen. 5. c. 4.

By an additional provision to the stat. 14 Ed. III., on the subject of amendments, the justices were empowered to amend such process and record after judgment as well as before.

Certiorari.
Stat. 2 Hen. 5. st. 1. c. 2.

A practice having sprung up for defendants in custody on execution, to sue out a *certiorari*, or an *habeas corpus cum causa*, and when brought before the chancellor to get themselves discharged upon bail or mainprise, to the injury of the plaintiffs, it was enacted, that if upon such writs it was returned, that the person was a prisoner upon a judgment, he should be remanded immediately, and there remain without bail or mainprise until he had agreed with the plaintiff.

Justices of the peace.
Stat. 2 Hen. 5. st. 1. c. 4. st. 2. c. 1.

In addition to the other qualifications of justices of the peace, it was now required that they should be resiant within the shire where they were named of the quorum; except lords named in the commission and justices of the bench. They were likewise to be appointed, by the advice of the chancellor and the king's council, from among the most sufficient persons of the respective counties.

Jurors.

Complaints against jurors continued to be as great as ever,

particularly as the act states, that common jurors and others that had but little to live on but by such inquests, and nothing to lose on account of their false oaths, it was enacted, that none should be admitted to pass on inquests, unless he had the yearly value of forty shillings above all charges.

Stat. 2 Hen. 5. st. 2. c. 2.

Bailiffs.

Bailiffs of sheriffs were prohibited from continuing in office above one year, and were not eligible for the next three years following, unless they were bailiffs of sheriffs inheritable in their sheriffwicks. Likewise, no undersheriff, sheriff's clerk, receiver, or sheriff's bailiff, might be attorney in the king's court while he was in office with such sheriff.

Stat. 1 Hen. 5. c. 4.

Riots.

Further provisions against rioting were now rendered necessary, by the influx of Welsh and Irish beggars, who committed many outrages and depredations. Remedy was given by one statute to parties who were aggrieved by the dilatoriness and negligence of the justices and others intrusted with the execution of laws against rioters. By another statute in the same year, the powers of justices of the peace were enlarged, so that they might hear and determine offences committed by the Welsh in their inroads into Shropshire, Herefordshire, and Gloucestershire; in such cases they might award process of outlawry, and certify this to the lords of seigniories, where these plunderers resorted, who were to order execution thereon. By another statute in the next year it was ordained, that Britons, not made denizens, were to be voided out of the realm by a certain day under pain of felony, except such as were specially named or obtained the king's licence. It had been previously enacted, in regard to the Irish, that all Irish clerk-beggars, called chamber-deacons, and all other Irish, were to leave the realm by a certain time, on pain of losing their goods and being imprisoned at the king's pleasure; excepting graduates in the schools, sergeants, and apprentices of the law, and those who were inheritors in England, religious persons professed, merchants of good fame and their apprentices, and those with whom the king would dispense.

Stat. 2 Hen. 5. st. 1. c. 8

Stat. 2 Hen. 5. st. 2 c. 5.

Stat. 3 Hen. 5.

Stat. 1 Hen. 5. c. 8.

Flying process.

In cases of murder, manslaughter, insurrection, and the

CHAP. XXIII. HENRY V. Stat. 2 Hen. 5. c. 9.

assembling of people in great numbers, if the offender fled, and any one complained thereof to the chancellor, a writ of *capias*, and afterwards of proclamation, was to be issued, and the party in default to be attainted. If the fact happened in the county of Lancaster, or other franchise, where there was a chancellor and a seal, the chancellor was to write to the chancellor thereof, all the suggestions of the aforesaid bill, commanding him to make execution thereof in the above way.

Stat. 9 Hen. 5. c. 7.

When process of outlawry had been made against parties living in franchises, where the king's writ did not run, it was enacted, that the justices, before whom the process was returned, was to certify it to the ministers of those franchises who were immediately to seize the lands, goods, and persons of the offenders.

False indictments. Stat. 7 Hen. 5. c. 1.

Because the indictments in the county of Lancaster sometimes charged offences to be committed in places that did not exist; a statute in the 7th year of this king provided, that such process was to be declared void, and the indictors, procurators, and conspirators, were to be punished by imprisonment. This was confirmed by another statute in the 9th year.

Stat. 9 Hen. 5. st. 1. c. 1.

Forging deeds. Stat. 1 Hen. 5. c. 3.

When deeds were forged to dispossess persons of their lands and tenements, which the act complains of as a frequent practice, it was now provided, that the injured party should recover damages, and the offenders be fined at the king's pleasure.

Year-books.

The year-books of this reign are not complete, the third, fourth, and sixth years being wanting. Those which are extant contain nothing worthy of observation.

CHAPTER XXIV.

HENRY VI.—EDWARD IV.

Statute Law under Henry VI.—Parliament.—Elections.—Qualifications of Electors.—Qualifications of Knights of the Shire.—Duties of Sheriffs in conducting Elections.—Privilege of Parliament.—Judicature of the Council.—Chancery.—Court of the Steward and Marshal.—Justices of Nisi Prius.—Sheriffs.—Bail.—Attornies.—Pernors of Profits.—Assizes of Novel Disseisin.—Attaints.—Empannelling Juries.—Abuses of Process.—Statute of Amendments.—Embezzling Goods by Servants.—Embezzling Records.—Threatening Letters.—Holding Confederacies.—Breaking Prison.—Criminal Process.—False Indictments.—Riots.—Trial of Peeresses.—Decisions of Courts.—Statute Law under Edward IV.—Staple.—Coinage.—Truces and Safe-conducts.—Nuisances.—Keeping Swans.—Sheriff's Tourn restricted.—Court of Piepoudre.—Escheators.—Prohibited Games.

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HENRY VI.

THE reign of Henry VI. furnishes us with very little on the subject of the statute law, except amendments and alterations of the statutes of preceding reigns.

Statute law.

The most important act of this reign was that which defined the qualifications of those to be elected as members of parliament, and those who were to elect, the provisions of which remain for the most part in force to the present day.

Parliament.

Elections.

Endeavours had hitherto been made to secure freedom of election, and to enable all to give their votes who had a right so to do, the consequence of which was, that numbers had come together for this purpose who had no right whatever. The preamble to the statute complains, that "elections of knights of shires have now of late been made by very great

Stat. 8 Hen. 6. c. 7.

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outrageous and excessive numbers of people, dwelling within the same counties of which the most part was people of small substance and of no value, whereof every of them pretended a voice equivalent, as to such elections to be made, with the most worthy knights and esquires dwelling within the same counties, whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people shall very likely arise, unless due remedy was provided."

Qualification of the electors.

The statute therefore directs, that the knights of the shire should be chosen by the people dwelling and resident in the county, having free land or tenement to the value of 40*s*. by the year, at least, above all charges. The sheriff had authority given him to examine, upon the Evangelists, every such chooser, how much he expended by the year; and if he returned any one contrary to this act, and was attainted thereof, he was to forfeit 100*l*., and to be imprisoned for a year without bail or mainprise: moreover the knights were to lose their wages. The freehold was, by a subsequent statute, required to be in the county where the elector resided.

Stat. 10 Hen. 6. c. 2.

Qualifications of the knights of the shire.

Stat. 23 Hen. 6. c. 15.

The persons chosen were, in affirmance of preceding statutes, to be dwelling and resident in the county; and, in a subsequent statute, it is added, that the knights of shires should be notable knights of the county for which they were chosen, or otherwise such notable esquires or gentlemen of the same county, *gentils hommes del nativete*, as were able to become knights, and no man of the degree of *vaillets*, that is, yeomen, or under.

Duties of sheriffs.

Stat. 8 and 23 Hen. 6.

As to the duties of sheriffs in conducting elections, they were also defined by these statutes. The sheriff was, after the delivery of the writ to him, to make and deliver a sufficient precept, under his seal, to every mayor and bailiff in the county, reciting the writ, and commanding him by such precept to elect citizens and burgesses to come to parliament, which precept was to be returned to the sheriff, by indenture between them, declaring the election and the persons chosen; and the sheriff was to make a return thereof, together with the writ.

A sheriff, not making due election at the appointed time (that is, in full county, between the hours of eight and eleven in the forenoon), or not making a good and true return of such election of knights, was to forfeit 100*l*. to the king, and 100*l*. to the party suing; but actions against the sheriff by the party grieved were to be instituted within three months after parliament commenced. Mayors and bailiffs were, in like case, to forfeit 40*l*.

Privilege of parliament. Stat. 11 Hen. 6. c. 11.

For the further protection of members attending parliament, a statute in the 11th year of this king confirmed and enforced the stat. 5 Hen. IV. against such as assaulted or committed any assault on members of either house. Proclamation was to be made for the offender to appear at the King's Bench within a quarter of a year, otherwise he was to be attainted of the fact, and pay the party double damages, besides a fine to the king. A similar provision had been previously made in favour of members of convocation and their servants.

Stat. 8 Hen. 6. c. 1.

That this privilege of parliament now comprehended an exemption from arrest, is ascertained by the rolls, in the 8th year of this king, where it is said that a servant to William Lake, a burgess of London, being committed to the Fleet in execution for debt, was delivered by the privilege of the Commons House; but authority was given by the chancellor to appoint certain persons by commission to apprehend him after the end of parliament.

Cott. Abrid. 596. Reeves' His. iii. 269.

Cott. Abrid. 651.

The Commons were not, however, yet in such full enjoyment of their privileges that they might not be infringed when they interfered with the prerogative of the crown. Thus, in the 31st year of this king, the speaker of the Commons House was taken in execution in an action of trespass, *de bonis asportatis*, at the suit of the Duke of York, president of the parliament; and, after representation of the case had been made to the king and the Peers, the latter came to the resolution that the speaker should remain in custody, and the Commons, acquiescing, chose another speaker.

Parl. Hist. ii. 287.

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Judicature of the council.

Stat. 31 Hen. 6. c. 2.

As the jurisdiction of the council had of late been so much called in question, particularly where parties were required to appear before the king and his council, upon suggestions made against them for riots and other grievous offences, it now became necessary to enforce obedience to writs issued under the great seal. Wherefore the sheriffs were commanded, by a statute in the 31st year of this king, under a penalty of 200*l.*, to make proclamation in the shire town of the county where the party dwelt, three several days after the delivery of the writ, for the party to appear before the council or chancellor, within a month after the last day of proclamation. If he failed to appear, he was to forfeit all his offices, fees, annuities, and possessions which he had of the grant of the crown; and, if after proclamation made again, he still refused to appear, he was, if a peer, to lose his estates and name of lord, and place in parliament; if a commoner, he was to be punished for his disobedience by a fine, or be put out of the king's protection. At the same time it was expressly declared, that no matter determinable by the law of the realm should be heard or inquired of in the council.

Chancery.

Cott. Abrid. 566.

The jurisdiction of the Chancery being still an object of jealousy, the Commons prayed that no man might be bound to answer in the Chancery for any matter determinable at common law under the penalty of 20*l.*, to be paid by the party suing there; to which it was answered, that the stat. 17 Richard II. should be executed. Nevertheless, to prevent the possibility of oppression, a statute was passed in the 15th year of this king, which ordained that no writ of subpœna should be granted until surety was found to satisfy the party grieved in case the matter of the bill did not prove to be good.

Stat. 15 Hen. 6. c. 4.

Court of the Steward and Marshal.

Barringt. Obs. on Stat. 362.

Notwithstanding the endeavours which had been made to keep the court of the Steward and Marshal within its bounds, it appears that it had, by a fiction, supposed parties to be of the king's household who were not so; and in consequence had unlawfully enlarged its jurisdiction. In order,

therefore, to put a stop to this evil, it was enacted, that in every surety thenceforward to be taken for a defendant, he was not to be estopped by the record, to say that himself or the plaintiff was not of the king's house, as supposed by the record.

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Stat. 15 Hen. 6. c. 1.

The jurisdiction of the justices of Nisi Prius was enlarged by a statute in the 24th year of this king, which empowered these justices to give judgment in all cases of felony and treason, as well upon acquittal as conviction, and to award execution. Before this statute, they could only hear and determine, but not pass judgment.

Justices of Nisi Prius.

Stat. 24 Hen. 6. c. 1.

Notwithstanding the statutes passed against sheriffs continuing in office above a year, it was now found necessary to enforce the observance of this law, by inflicting a penalty of 200*l.* on the offender for every year that he continued in office. Likewise, for the prevention of perjury, extortion, and oppression on the part of sheriffs, coroners, and others, the fees which were to be lawfully taken were defined, and the course of proceeding in letting to bail upon arrests was minutely prescribed. Sheriffs, bailiffs, and other officers were required to let all persons out of prison, in any personal action or indictment of trespass, upon reasonable sureties, having sufficient within the counties where such persons were let to bail. They were likewise to take an obligation afterwards, called a bail-bond, for which they were to receive 4*d.*, and nothing more, on pain of forfeiting treble damages to the party aggrieved, and 40*l.* besides, one-half to the king and one-half to the party aggrieved.

Sheriffs, &c.

Stat 23 Hen. 6. c. 8.

Ibid. c. 9. 10.

That the number of attornies had now increased to an inconvenient degree may be gathered from the preamble to a statute in the 33d year of this king, which complains that not long since, in the counties of Norfolk and Suffolk, there were only six or eight attornies, at most, coming to the king's courts, in which time great tranquillity reigned in those places, and little vexation was occasioned by untrue and foreign suits; but now there are in those places four score attornies, or more, the generality of whom have nothing to

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live upon but their practice, and besides are very ignorant. The act goes on to complain, that these attornies came to fairs and markets, and other places where there were assemblies of the people, exhorting, procuring, and moving, persons to attempt untrue and foreign suits, for small trespasses, little offences, and small sums of money, which might be determined in courts baron, so that more suits were now raised for malice than for the ends of justice. With the hope of remedying these evils, it was enacted, that in future there should be but six common attornies in the county of Norfolk the same number in Suffolk, and in the city of Norwich only two, to be appointed by the two chief justices of the most sufficient and best instructed. Any other persons acting as attornies were subjected to heavy penalties.

Pernors of profits. Stat. 11 Hen. 6. c. 3.

In regard to remedies for civil injuries, some alterations were made that are worthy of notice. The provision made against disseisors by the stat. 4 Hen. IV., was made applicable to all manner of writs grounded upon novel disseisin, so that the pernor of profits, as he was now called, was made liable to all demands and obligations in the same manner as if he had been legally seised of the freehold.

Assizes of Novel Disseisin. Stat. 4 Hen. 6. c. 2.

In assizes of Novel Disseisin, it was sometimes the case that the sheriff was named a disseisor, to the end that the writ might be directed to the coroner and the assize, secretly awarded upon the tenant's default; wherefore, to remedy this mischief, it was now enacted, that upon the tenant's averment thereof, the writ was to be quashed, and the plaintiff amerced.

Attaints. Stat. 11 Hen. 6. c. 3. 15 Hen. 4. c. 5.

Delays in the proceeding by attaint were prevented by several statutes, which put a stop to feigned and foreign pleas brought by the defendants.

Empannelling juries. Stat. 6 Hen. 6. c. 2.

In special assizes, the panels were to be arranged, and an indented copy thereof delivered by the sheriff to the parties six days at least before the sessions of the justices. Besides, several grievances in the course of judicial proceedings were now removed by parliamentary enactments. To prevent

Abuses of process.

false entries being made of the plaintiff's appearance, whereby the defendant was unjustly outlawed, it was provided that no such entry was to be made by any officer under the penalty of 40s. except the plaintiff or some credible person of his counsel, appeared in person before the justices. For the protection of women, who were enforced, or by dissimulation procured to be bound by statute-merchant or obligation, a statute, in the 31st of this king, gave the party a writ out of Chancery, commanding the party who procured the obligation to appear before the chancellor, or some justice assigned by him; and if on examination it was found to have been so procured, it was to be declared void. The sheriff was enjoined to execute the writ, upon pain of 300*l*., whereof one-half was to go to the king, and one-half to the party aggrieved.

Stat. 10 Hen. 6. c. 4. 18 Hen. 6. c. 9.

Stat. 31 Hen. 6. c. 9.

Statute of Amendments.

Stat. 4 Hen. 6. c. 12.

The stat. 9 Hen. V., respecting amendments, being but a temporary act, was revived in the 4th year of this king; and further provisions were made by a subsequent act, that for error assigned in any record, process, warrant of attorney, and the like, the judges were to have power to reform and amend whatever in their discretion seemed to be misprision of the clerks, so that no judgment should be reversed, or record annulled by reason of such misprision. Appeals, indictments of treason, and outlawry, and all other cases, are excepted out of this act, where proper additions according to the stat. 1 Hen. V. were left out.

Embezzling goods by servants.

Stat. 33 Hen. 6. c. 1.

It appears that servants, availing themselves of the consternation and confusion which ensued on the death of their masters, were now sometimes guilty of the practice of violently and riotously seizing the goods of the deceased; wherefore executors were provided with a writ of proclamation out of Chancery against such offenders.

Embezzling records.

Stat. 8 Hen. 6. c. 12.

Threatening letters.

Stat. 9 Hen. 6. c. 6.

Embezzling records, which was before punishable only with imprisonment, was now made felony. Also those who aided in this offence were made felons. Sending threatening letters to persons, that if money was not deposited in certain places, their houses should be burnt, was made treason. As

was also breaking prison, where the offender was appealed, indicted, or suspected of high treason.

Holding confederacies.
Stat. 3 Hen. 6. c. 1.

As masons were now in the habit of holding confederacies and meetings, for the purpose, as appears from the preamble to the act, of concerting schemes to evade the statute of Labourers, it was now enacted that any one causing such chapiters or congregations to be assembled should be guilty of felony.

Criminal process.
False indictments.
Stat. 6 Hen. 6. c. 1.

Several provisions were made in this reign for the purpose of regulating criminal prosecutions, so as to prevent all oppressions. From the preamble to an act in the 6th year of this king we find that, it was common for persons to be indicted by suspect jurors, hired and procured to the same by confederacy and covin, upon which a *capias* used to be awarded to the sheriff of the county where the bench was, returnable within two or four days; when, if the party came not, an exigent would be awarded, and so the goods become forfeit. For the remedy of this evil, it was now enacted, that before any exigent was awarded, in such case a writ of *capias* should be directed to the sheriff of the county where they were so indicted; as also to the sheriff of the county whereof they were named in the indictment; this *capias* having six weeks, at least, before the return of the same. To prevent indictments and appeals from being preferred in foreign countries, by which defendants were taken by surprise, it was enacted, that a second *capias* should issue presently after the first. So likewise, when indictments taken before justices of the peace were, for the sake of evading this statute, removed by *certiorari* into the King's Bench, it was enacted that a second *capias* should be awarded with a similar process.

Stat. 8 Hen. 6. c. 10.
10 Hen. 6.

Riots.

The stat. 2 Hen. IV. respecting riots, was revived in the 8th year of this king, with this alteration, that before awarding the *capias*, it was to be testified by two justices of the peace, that a common fame and rumour ran of such riots.

Trial of peeresses.

The provision in Magna Charta, c. 29, respecting the trial

of peers, was extended by a statute, in the 20th year of this king, to ladies of great estate, such as duchesses, countesses, or baronesses, who, when put to answer on indictments were, whether married or sole, to be tried as peers of the realm.

Stat. 20 Hen. 6. c. 9.

Statute law under Edw. IV.

The reign of Edward IV. affords but little worthy of notice in regard to the statute law.

Staple. Rolls of Parl. v. 503. Stat. 3 Ed. 4 c. 1, et seq.

In consequence of a petition from the Commons, the king turned his thoughts towards his foreign dominions, and to the welfare of the staple and mint which were established at Calais. To this end, a statute was passed, in the 3d year of his reign, containing several regulations respecting the staple. Among other things, it was ordained, that no person was to sell any wool, &c. to the staple, but for ready payment, one-half in lawful money, or in plate, or bullion of silver or gold. The money was to be brought into England, and the plate or bullion to be carried into the mint at Calais, to be coined, and, when coined, to be brought into England.

Coinage.

As the coin of the realm appears to have been debased in this and the preceding reigns, a statute was passed in the 17th year of this king, for the purpose of enforcing the principal acts formerly passed for the preservation of the coin, and adding such other provisions as the circumstances of the nation called for.

Stat. 3 Ed. 4 c. 5. 22 Ed. 4. c. 1.

Among the regulations which affected trade and commerce, may be reckoned the sumptuary laws of the 3d and 22d years of this king, which limited the expense and fashion of dress to be worn by different persons, according to their degree.

Truces and safe-conducts. 14 Ed. 4. c. 4. *Nuisances.* 12 Ed. 4. c. 7.

All the statutes against the breakers of truces and safe-conducts were now confirmed, except 2 Hen. V. st. 1, c. 6, also the stat. 1 Hen. IV. on the subject of weirs, fishgarths, and other nuisances; to which were added some further regulations, by way of enforcing the observance of that statute.

Keeping swans. Stat. 22 Ed. 4. c. 6.

An addition was made to the game laws, by a statute in the 22d of this king, which enacted that no person, other than the king's son, unless he had lands of freehold to the

value of five marks a year, should have any mark or marks of swans, on pain of forfeiting the swans, half to the king and half to the person having lands of said value, who should seize the same.

Sheriff's tourn restricted.

Stat. 1 Ed. 4. c. 2.

One of the principal changes effected by legislative enactment in this reign, was the abridgment of the sheriffs' jurisdiction, which seems to have been called for by the numerous abuses committed by sheriffs and their officers, as stated in the preamble to the statute: "Because of the inordinate and infinite indictments and presentments, as well of felony, trespass, and offences, as of other things, which had of long time been taken before sheriffs, in their counties; undersheriffs, their clerks, bailiffs, and ministers, at their tourns or law-days; which indictments and presentments were oftentimes affirmed by jurors having no conscience, nor any freehold and little goods; and often by the said sheriffs' menial servants and bailiffs, and their undersheriffs, by which indictments people were attached and arrested, and put in prison, and constrained to make grievous fine and ransom; after which, they would be enlarged, and the indictments embezzled and withdrawn." For these reasons, the power of awarding process on indictments and presentments was taken from the sheriffs' tourn, and transferred to the quarter sessions. Sheriffs were now directed under a penalty of 40*l.* to deliver all indictments to the justices of the peace at the next quarter sessions, and were prohibited from arresting, putting into prison, or levying any fine, before they had process from the justices, on pain of forfeiting 100*l.* The sheriffs of London were excepted from this act. Thus was an end, as it were, put to a court, which, in the time of the Saxons, when the alderman and bishop presided there, was the great criminal court of the realm. After the Conquest, it suffered a gradual abridgment of its power by the successive institution of justices in eyre, justices of oyer and terminer and gaol delivery, and, finally, of justices of the peace, by which it was deprived of the last remnants of its jurisdiction. As to the sheriff, it seems as if

Ante, p. 25.

he had received an accession of power at the Conquest, when he presided in a court where before he had only sat as a subordinate minister, and that now by this change, he was only brought back to the rank and office which he held among the Saxons.

Court of Piepoudre.

Another ancient, though petty tribunal, known by the name of the court of Piepoudre, was now the subject of a statute. This court was held at fairs, for determining all suits of contracts, trespasses, and the like within and during the time of the fair, which were tried by the merchants who resorted to the fair. It was called Piepoudre *curia pedis pulverizati*, because, as Lord Coke supposes, "there shall be as speedy justice done for advancement of trade and traffick as the dust can fall from the feet, the proceeding there being *de hora in horam*." Barrington deduces it from *pied puldreaux*, an old French term for pedlar, not thinking that this term was itself derived from the same source, and applied to such travelling traders for the same reason. The English word pedlar is doubtless derived from *pes*, a a foot, signifying one who goes about trading on foot. This court, which had doubtless existed from the time of the Conquest, if not before, is mentioned by Bracton, who alludes to its expeditious mode of proceeding: "Item propter personas, qui celerem debent habere justitiam, sicut sunt mercatores, quibus exhibitur justitia pepoudrous."

Co. 4 Inst. 271.

Barringt. Obs. on Stat.

Bract. fol. 334.

It appears that this court, like most others in those days, had aimed at enlarging its jurisdiction; it was now thought necessary so to define it as to prevent suits from being brought there which belonged to other jurisdictions. To that end it was enacted, that the plaintiff, or his attorney, was to swear that the matter arose within the bounds of the fair.

Stat. 17 Ed. 4. c. 2.

Eschcators.

The stat. 42 Ed. III., which enacted, that no escheator was to be made unless he had 20*l.* of land in fee, was confirmed by the stat. 12 Ed. IV. c. 9, which further required, that he should have lands or rents in fee simple, fee tail, or for life, of the yearly value of 20*l.* within the county whereof

Stat. 12 Ed 4. c. 9.



he was to be escheator. He was likewise required to fill the office in person, or to be answerable for the person who was in his place.

Prohibited games.

The stat. of 12 Ric. II. was confirmed in regard to prohibited games, with this addition, that whoever suffered such games to be used in their houses, or other places, were to be imprisoned three years and fined 20*l*.

CHAPTER XXV.

EDWARD IV.

Common Law.—Real Property.—Tenures.—Knight's Service.—Socage.—Escuage.—Serjeanties.— Grand Serjeanties. — Petit Serjeantie.—Tenure in Frankalmoigne.—Tenure in Burgage.—Tenure in Villenage.—Pure Villenage.—Privileged Villenage.—Copyholders.—Condition of Villeins.—Rents.—Estates.—Fee Simple.—Fee Tail.—Estates of Freehold.—Estates less than Freehold.— Conditional Estates.— Mortgages.— Parceners.—Parceners by the Common Law.—Parceners by Custom.—Hotchpot.—Joint-Tenants.—Tenants in Common.

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Common Law. Real property. Tenures.

As the Common Law, particularly in regard to real property, was now fast approaching to the mould and form in which it exists at present, a general view of its state at the period we are now treating of will enable the reader to compare it with what it was before, and what it has been since.

Hitherto the doctrine of tenures had almost exclusively occupied the attention of the lawyer, but in proportion as the interest in landed property got transferred into a multitude of hands, and became diversified and modified, either by legal enactments or the changes of the times, new questions of law naturally came into discussion, and the decisions of courts varied accordingly.

Knight's service. Socage. Litt. sect. 118. 120.

The two principal tenures, knight's service and socage, were now distinguished by the circumstance, of whether the services were uncertain or certain. When the services to be rendered were uncertain, then the tenure was known to be knight's service, and was burdened with ward, marriage, relief, and the other incidents of that tenure; but when the

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services were certain, then it was evident that the lands were held by socage tenure.

Escuage.

Ante, p. 77.

Litt. s. 120.

Agreeably to this rule of distinction, we find that escuage, which, under the name of scutage, was originally a composition for personal service, was either knight's service or socage tenure. When the escuage which was to be paid was uncertain, being more or less according to the pleasure of the king or the assessment of parliament; then the tenure by escuage was a sort of knight's service. In the reign of Henry II., escuage was assessed at the pleasure of the king; but after the Magna Charta of King John, it was assessed by parliament. When a tenant held by a certain escuage, that is, by a certain sum to be paid whatever might be the assessment, this was reckoned tenure by socage.

Ibid. ubi supra.

Grand Serjeantie.

Litt. s. 153.

Ibid. 15.

Ibid. 158.

Grand and *petit serjeantie* are two sorts of tenure but partially mentioned before this time, and probably were not much in use as distinct tenures, when the feudal system was in full force. *Grand serjeantie* is now said to be, where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his own proper person. It was called *grand serjeantie*, i. e. *magnum servitium*, because it was a greater and more worthy service than the service in the tenure of escuage. Tenants by *grand serjeantie* held of the king by knight's service, and were liable to ward, marriage, and relief; but not to escuage, unless he held by escuage and *grand serjeantie*.

Petit Serjeantie.

Litt. s. 159.

Ibid. 161.

Mag. Chart. c. 28.

Litt. s. 161.

Brit. c. 66.

Flet. l. 1. c. 10.

Bract. fol. 35.

Petit serjeantie is said to be, where a man holds his lands of our sovereign lord the king, to yield to him yearly a bow or a sword, or such other small things. This was a sort of socage tenure by the rule above mentioned, because the tenant paid yearly a certain thing to the king, as a man ought to pay a rent. Besides, we learn from Magna Charta that tenants by *petty serjeantie* were liable neither to ward or marriage. Littleton says, that none could hold by either *grand* or *petit serjeantie*, but of the king, in which he agrees with Britton and Fleta; in Bracton's time, however, it appears to have been otherwise. He says, that tenants by

petit serjeantie might hold of others besides the king, and that such tenants were called rodknights.

Homage auncestrel was a species of tenure which time naturally produced, and of course was not likely to be an object of notice at the early periods of the feudal system. It is now described to be, where a tenant and his ancestors held of the same lord and his ancestors time out of the memory of man by homage. It was so called on account of the continuance, by the title of prescription, in the tenancy in the blood of the tenant as well as in that of the lord. The peculiarity of this tenure was, that it drew after it and implied homage, and also acquittal; so that when the lord had received the homage of such tenant, he was bound to warrant the tenant when he was impleaded of the land held of him, and to acquit the tenant against any lord paramount of all manner of service: but, in order to give effect to these obligations, it was absolutely necessary that the privity and prescription should be strictly preserved, in so much that if a tenant aliened in fee, and took an estate again of the alienee in fee, though he held the land by homage, yet it was not homage auncestrel, and did not draw after it the warranty and acquittal above mentioned. There is no express mention of this tenure either in Glanville or Bracton; but the latter author informs us that homage remained in force between lord and tenant as long as any heirs remained on both sides, and as long as the tenant held his tenement, subject to the service which induced the obligation of homage; but when these failed, then the homage ceased, and could not be revived, except in the persons of others upon fresh ground. As this obligation between the lord and the tenant might be dissolved from a variety of causes, it is fair to suppose that there never were many examples of this tenure.

Litt. s. 143.

Bract. fol. 81.

Tenure in Frankalmoigne.

It has already been stated, that gifts of land might be made to religious houses or persons, *in liberam eleemosynam*, in free alms, which was now called tenure in frankalmoigne. From what is mentioned respecting this tenure it

Ante, p. 87.

Ante, p. 9. Bract. 27.

appears, that such gifts were more in favour of the church than they had been in the time of the Saxons, in whose gifts the *trinoda necessitas* was invariably excepted, from all other exemptions and immunities. But gifts *in liberam et puram eleemosynam* were, as Bracton informs us, excused from every service, and the donor and his heirs were bound to warrant the donee against all claims of the chief lord; but other gifts were made in his time simply *in liberam eleemosynam*, which were not altogether exempted from the feudal burdens. At the period we are now treating of, we find that tenants in frankalmoigne, in the proper sense of the term, were free from every earthly or temporal service, and were only bound before God to make orisons, prayers, masses, and other divine services, for the souls of the grantor and his heirs; but these tenants did no fealty, and could not be distrained for not doing these services. There was another kind of tenants in frankalmoigne, who, for distinction's sake, are called tenants by divine service, because they held of their lord, by a certain divine service, as to sing a mass every Friday in the week, or every year at such a day, &c. These tenants did fealty, and might be distrained for not doing the service. Britton calls this latter kind of tenure simply *aumone*. After the statute of *Quia Emptores*, 18 Ed. I., no gifts could be made by a subject in pure alms or in frankalmoigne, because none but the king could alien or grant lands or tenements in fee simple to hold of himself.

Litt. s. 135. Ibid. 136. Ibid. 137. Britt. fol. 164. Litt. s. 140.

Burgage tenure.

Tenure in burgage is incidentally mentioned by different writers, from the time of Glanville to the present period. We now find it described to be, where lands or tenements within a borough were held of the king or some other lord of the borough by certain rent. It was called burgage from burg, which Lord Coke supposes to come from the Sax. *borrhoe*, more properly *borh*, a pledge; a borough signifying the same as a company of ten families which were one another's pledge; but the more probable derivation is from the Ger. *burg*, Sax. *byrig*, a walled or fortified town con-

Litt. s. 162, 163, 164. Co. Inst. 109.

nected with the Gr. πυργος, a tower, because, originally, all important places were fortified and walled in. According to the feudal system, such towns were supposed to be held either mediately or immediately of the king, from whom they received many privileges, among others that of sending burgesses to Parliament.

Litt. s. 164.

This tenure in burgage is distinguished by several peculiarities arising from the customs of their boroughs, which differed from the common law of the land; but at the same time formed a part of the common law. In some boroughs it was, as before observed, the custom for the youngest son to inherit his father's tenements within the borough, which was known by the name of Borough-English, so called, as is supposed, because this custom first began in England. In other boroughs women used to have for their dower all their husbands' tenements, and in others it was the custom for a man to devise by will his lands and tenements, and the devisee might enter without livery of seisin. But no custom was allowed to be good except it had been used by title of prescription, *i. e.* time out of mind.

Ibid. 169. Ante. p. 83. Co. Inst. 110. Litt. s. 166. Ibid. 167. Ibid. 170.

Tenure in villenage.

The last tenure entitled to notice, is that which was at this time distinguished expressly by the name of a tenure in villenage, which had been gradually rising into notice, and was, in the time of Bracton, distinguished into pure villenage and villein socage, or privileged villenage.

Bract. fol. 26.

Pure villenage.

Pure villenage was the tenure, whereby the villeins by birth originally held small portions of land to do base services, as to plough the lord's lands, carry and spread the dung, and the like. The service in this case was uncertain and indeterminate, so that the villein did not know in the evening what was to be done in the morning, but was to do what was commanded him.

Bract. fol. 208. Brit. c. 31. Litt. s. 172.

Privileged villenage. Bract. 76.

Tenants by villein socage, or privileged villenage, were those who, though free in their persons, yet held their lands by villein or base services. These were mostly to be found in the king's demesnes, where they had been before the Conquest. In the disorders of the times, they were dispossessed

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of their lands by the lords, to whom they were allotted, and afterwards permitted to hold them in villenage. Some of them held their lands by villein services, to plough the king's lands for a certain number of days, to furnish the court with provisions and the like, from which they gradually acquired additional privileges and immunities. In the reign of Henry II., such tenants were known by the name of *custumarii tenentes*, because they held their lands, and performed their services, according to the custom of the manor. They had a greater certainty in their estate than those who held in pure villenage, for these latter held their lands absolutely at the will of the lord, so that they were not permitted to hold them against his inclination, nor quit them without his consent. On the other hand, tenants by privileged villenage became so attached to the soil as to acquire the name of *adscriptitii glebæ*, and as long as they did the appointed services, they were not to be removed; and if ejected, it seems that they might, in Bracton's time, have an assize. Thus then, although said to hold at the will of the lord, yet it was understood to be according to the custom of the manor. It appears also, that even at this period that some of these tenants in villenage had acquired also the liberty of leaving their lands; for, although they could not alien them by deed, yet it should seem, from both Bracton and Britton, that they had the liberty of surrendering their lands into the hands of the lord, to the use of him to whom they had transferred their estate. In the reign of Edward III., they had made such advances as to be permitted to adduce in the lord's court, in evidence of their title, the copy in the court roll, whence they were called tenants *per roll selonque le volonté le seigniour*. In the reign of Richard II. claims were set up by tenants holding in pure villenage, on the ground that they were also entitled to some of the privileges enjoyed by the villein sokemen: in consequence of which, a commission of inquiry issued, which probably terminated in favour of many of the claimants; and, at all events, established those claims which were

Bract. 7.

Brit. fol. 165. Flet. l. 1. c. 8. Dial. Scacc. chap. Quid sit Murdrum.

Bract. fol. 7.

Ibid. fol. 209. Britt. ubi supra.

42 Ed. 3. 35.

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allowed. In the subsequent reign these tenants were denominated tenants *per le vierge*, from the peculiar mode of conveying such an estate, namely, by means of a little rod, which he who was going to surrender his tenements delivered into the hands of the steward or bailiff, according to the custom of the manor. In the next reign they are expressly called tenants *per copie*, which, rendered into English, was, according to the modern appellation, copyholder; so called, because they had no other evidence, concerning their tenements, but the copy of the court roll.

14 Hen. 4. 34.

1 Hen. 5. 11.

F.N.B. fol. 12.

Co. Inst. 58.

Litt. s. 75.

The modes of surrender varied according to the customs of different manors, sometimes by the delivery of a verge or rod to the bailiff or steward as before observed, sometimes by surrendering the lands to a bailiff, or to two *probi homines* of the lordship, to the use of him who was to have them in fee simple or fee tail, and they were to present this at the next court, and then he to whom the land was delivered was to have it by copy, according to the intent of the surrender. The custom of manors, however, in regard to the surrender of such tenements, and other particulars respecting them, were very various; but there was one universal rule in regard to such tenants, that they could neither plead nor be impleaded in the courts of common law, only in the Lords' court. Such was the origin of those tenants called copyholders, who, though very meanly descended, came, as Lord Coke observes, of a very ancient house.

Ibid. 78.

Ibid. 79.

Ibid. 80.

Bract. fol. 7.

Co. Cop. c. 32.

The tenure in pure villenage, which Littleton calls simply tenure in villenage, as distinguished from tenants *per copie* and tenants *per vierge*, is described by him much after the manner of former writers, but as the condition of villeins improved, this naturally approached nearer and nearer to the above mentioned tenure, until they were finally lost under the general name of copyholders, with this formal distinction, that the words "at the will of the lord" are retained in the copies of common copyholders or the tenants in pure villenage, and left out in those of the superior copyholders or tenants in privileged villenage.

Copyholders.

Ibid. c. 32.

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Condition of villeins.

Litt. s. 177, 178. Bract. fol. 196. Britt. c. 49. Flet. l. 2. c. 19. 4 Edw. 4. 50. Litt. s. 191. Flet. 2. c. 4. Litt. s. 190. Ibid. 202. Ibid. 204, et seq.

The condition of villeins was, in many particulars, better than it had been in former times. Although, according to the old rule, whatever a villein acquired or possessed belonged to his lord; yet, if a villein purchased land or goods, and aliened them before the lord entered, he could not recover; but this rule did not apply to the king, because the maxim *nullum tempus occurrit regi* was applicable in such cases. A villein might have all manner of actions against any person, except his lord, in the time of Bracton; and at this time he might also have an action against him in certain cases, as if a villein was made executor, he might have an action of debt against his lord, if the latter was a debtor to the testator. He might also have an appeal for the death of an ancestor, and if found for the plaintiff, he was enfranchised; a neif might also have an appeal of rape against her lord. If a villein became a regular, the lord could not seize his goods, but he might have an action against the sovereign of the house; so likewise, if a freeman married a neif, her lord could not take her away, but he might have an action of damages against the husband for marrying his neif without his license. Besides these relaxations in the law of villenage, the condition of villeins was considerably ameliorated by the concessions of their lords, and their number was continually decreasing from the frequent practice of manumission or enfranchisement, which was now more common than ever, and might be effected in a greater diversity of ways, indirectly as well as directly; thus, if a lord made an obligation to his villein for a certain sum of money, or granted him an annuity, or made a feoffment of land or tenements, these and similar acts were all now considered as amounting to a manumission.

Ibid. 175. Ibid. 181, 182.

Villeins were now distinguished into villeins by prescription, and villeins by confession, in open court; villeins by prescription were those whose ancestors had been villeins time out of mind. They were likewise distinguished into villeins regardant, and villeins in gross. Villeins regardant

were the original and proper villeins who belonged to the manor. Villeins in gross were such as had been transferred from one lord to another, and belonged to the person of the lord and not to the manor.

Co. Inst. 120.

Rents.

While treating of tenures and services, there is another subject worthy of notice, namely, that of rents, which at this time was become a matter of some consideration. Rent, in Lat. *redditus*, a return, from *reddo*, to return, signified a return made by the tenant or lessee out of the profits of the land. We read of rents of different kinds in our ancient books, as *redditus assisus*, or *redditus assisæ*, rents of assize, so called because they were the rents of the freeholders and ancient copyholders, which were fixed by the assize and could not be varied. Those of the freeholders were called *redditus capitales*, chief rents, and both were named *quietis redditus*, quit rents, because the tenants thereby went quit or free from all other services. These rents were likewise distinguished by the names of *redditus albi*, white rents, or blanch farms, when they were paid in silver, and *redditus nigri*, black mail, when the rent was paid in work, grain, or base metal. Another kind of rents were termed fee-farm rents, not on account of the mode of payment, but because of the perpetuity of the rent, it being a perpetual farm or rent, issuing out of estates in fee; which, according to Britton, was the true value of the land more or less, and was, for the most part, one-fourth of the value, although it is supposed, that not the quantum of the rent, but the perpetuity, was essential to create a fee farm. This was a species of socage tenure, and was originally called *firma blanca*, or blanche farme.

Co. 2 Inst. 19

Brit. fol. 164.

Hargrav Co. Litt. 145. l. n. 5.

Co. 2 Inst. 44.

Littleton distinguishes rents into rent service, rent charge, and rent seck. Rent service was where a tenant held by homage, fealty, or any other service, and a certain rent. If such rent was not paid on the day, the lord might, by the common law, distrain for it, although the gift was not made by deed. Rent charge was where a rent was reserved by deed, with a clause enabling the donor or lessor and his

Litt. s. 213.

Ibid. 214.

Ibid. 218.

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heirs to distrain; it was so called in distinction from rent service, because it arose by force of the deed. Rent seck was where the grant was made without such clause of distress.

Not only the subject of rents, but every other particular respecting landed property, had undergone such changes as to affect the old law of tenures. The connexion between the landlord and tenant, and their mutual obligations, were daily growing weaker, and tenures were now considered principally in regard to the interest which a man had in his lands and tenements. Whence the language of the law underwent a corresponding change. A man's interest in his lands and tenements, as regarded the quality, quantity, and duration of that interest, were denoted by the word estate, which, from the Latin *status* and *sto*, to stand, signified what was fixed or permanent, or what might be reckoned upon. Instead of a feud we read of a fee, which was a corruption of that word, and was employed to denote the highest interest a man could have in lands and tenements, and from which all inferior interests were derived.

Fee simple. Litt. s. 1.

Fee tail. Litt. s. 13.

Ante, p. 169.

A fee was divided into a fee simple and fee tail. A fee simple was equivalent in signification to an absolute inheritance, or an estate of inheritance in the most extended sense of the word. A fee tail was only a limited inheritance, or an inheritance which was limited to certain heirs, from the word *talliare*, to cut, as before observed.

Estates of freehold.

Other estates were not estates of inheritance, but of freehold only, as that of tenant in tail after possibility of issue extinct, tenant by curtesy, tenant by dower, and tenant for term of life. The first kind of estates, which was derived from estates in tail, is mentioned in the reign of Edward III., and is described to be where tenements are given to a man and his wife in special tail; if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. Such tenants, although only tenants for life, yet having once had an estate of inheritance, were not to be impeached of waste. Tenant by curtesy, which was of a

1 Rom. 1. *Old tenures.* Litt. s. 32-34. Ante, p. 82.

much earlier date, has already been described, also that by dower; but there are five kinds of dower mentioned in this day, namely, dower by the common law, dower *ad ostium ecclesiæ*, and dower *ex assensu patris*, which have already been spoken of; also, dower by the custom, that is, by the custom of any town or borough, as that the wife should have the half or the whole of her husband's lands and tenements; and lastly, dower *de la pluis beale*, that is, literally, dower of the fairest tenements, which in certain cases a woman might, according to the judgment of the court, then choose from her husband's lands or tenements held in socage. Tenant for term of life was distinguished into tenant for the term *de sa vie*, of a man's own life, when a man let lands for the term of the life of the lessee, and tenant *pur autre vie*, when a man let lands for the term of the life of another.

Litt. s. 36. 38, et seq.
Litt. s. 37.
Ibid. 48.
Ibid. 56.

Estates less than freehold.

Among the estates which were less than freehold, was that of tenant for term of years, and tenant at will. The laws regarding these kinds of estates were now, owing to their frequency, more nicely defined than they had been heretofore, and in a manner conformable to the law as it exists at present. Tenants *per copie*, or copyholders, were, as before observed, said to be tenants at will, because their estate originally was not less precarious; but such tenants, at the time we are now treating of, might have an estate equivalent to a freehold, for they might hold lands in fee simple, fee tail, or for term of life, according to the custom of the manor, or the nature of the estate which was first granted. Tenant by statute merchant, and statute staple, or *elegit*, were said to hold their lands or tenements *ut liberum tenementum*, in the manner of a freehold; but it was not a freehold, only a chattel, which should go to the executors, and if the executors were ousted they could have an assize.

Co. Inst. 43.
28 Ass. 3.

Conditional estates.
Litt. s. 325.

There was another kind of estates described under the name of estates upon condition, to which conditions were annexed, arising from some pecuniary consideration, as when a man by deed infeoffed another in fee simple, reserving to

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him and his heirs yearly a certain rent, on condition that if the rent was behind, it should be lawful to the feoffor and his heirs to enter. Bracton speaks largely of conditional gifts; but these were mostly limitations of the inheritance to particular heirs, that by the statute *De Donis* were converted into estates tail, for the rents and services of the feudatory were considered by feudal writers as conditions annexed to the fief, so that if he neglected to pay the one or perform the other, it was understood that the lord might resume the fief. In process of time numerous other conditions were introduced, to suit the convenience or humour of the donor, which were termed express or conventionary, and the fiefs to which such conditions were annexed were termed improper fiefs, and at the period we are now treating of they had acquired the name of estates upon condition. One of the principal estates of this kind, which has continued to the present period, is that of the *mortuum vadium*, in Fr. *mortgage*, *i. e.* dead pledge, which, as Littleton observes, was so called because it was doubtful whether the feoffor or mortgagor would pay the sum at the time limited, and if he did not, then the land which was put in pledge was dead to him, and if he did pay, then it was dead to the feoffee or the mortgagee. In the time of Glanville, this species of security was not much favoured in law, but it appears to have been more so in the time of Richard II., for Sir Matthew Hale observes, that in the 14th year of this king the parliament would not admit of redemption. As this would, however, contrary to the spirit of the times, have encouraged alienation by means of mortgages, it appears that courts of equity soon after admitted, that although a mortgage was forfeited, by the non-fulfilment of the condition, yet if the estate were of greater value than the sum lent thereon, the mortgagor might, at any reasonable time, redeem his estate by paying the mortgage, principal, interest, and expenses; which proceeding was afterwards denominated Equity of Redemption.

Bract. l. 2. c. 5, et seq. Britt. c. 36. Flet. l. 3. c. 9.

Hargrav. Co. Litt. 201.

Mortgages.

Litt. s. 332.

Ante, p. 104.

Butler's Co. Litt. 20 a. n. 8.

Besides the above estates, which were considered sole, there were also others that might be enjoyed by more than

one person, the law of which is fully defined at this time. The owners of joint estates were either parceners, joint-tenants, or tenants in common.

Parceners. Parceners were either parceners by the common law, or parceners by the custom. When daughters took an estate in fee or in tail, they were parceners by the common law, and were considered as one heir in conformity with the principle laid down by Bracton, "Jus descendit quasi uni heredi propter juris unitatem."

Litt s. 241. Bract. fol. 66. Brit. c. 71. Flet. l. 5. c. 9.

Parceners by custom. Where lands, as by the custom of gavelkynd, descended to all the sons equally and in parcenary, they were called parceners by custom; for in this case the sons were parceners in respect of the custom of the fee or inheritance, and not in respect of their persons as the daughters.

Litt. s. 265.

Partition. When a partition was desired by any of the parties, it was either made by agreement, or where that could not be effected, then they might have a writ called a *breve de partitione faciendâ*, which is mentioned by Bracton, whereby the unwilling parties might be compelled to make partition.

Bract. fol. 71. Litt. s. 243, et seq.

There was another sort of partition which arose from gifts in frank-marriage, as if a man was seised in fee and had two daughters, and on the marriage of the eldest he gave lands in frank-marriage, and afterwards died seised of other lands of greater value, it was a rule in that case, that neither the husband nor the wife should have any property in such remnant of the estate, unless they would put the lands held in frank-marriage, into what was now termed hotchpot, from hodge-podge a pudding, *farrago* or mixture, which is alluded to by Bracton and subsequent writers.

Ibid. 266, et seq.

Hotchpot. Bract. fol. 77. Brit. c. 72. Flet. l. 6. c. 47.

Where of three parceners one wished to make partition, and two to hold in parcenary, then one part might be allotted in severalty to the one who wished it; but this could only be where the partition was by agreement, for if made by force of a writ, each was to have her part in severalty.

Ibid. 276.

Joint-tenants. Where lands were granted or leased to two persons to hold to them and their heirs, or for term of another man's life, by force of which feoffment or lease they were seised, they

Ibid. 277 Co. Inst. 180.

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were joint-tenants. They were so called because lands or tenements were conveyed to them jointly. They were *conjunctim feoffati*, or *qui conjunctim tenuerunt*, and were formerly called *participes et non hæredes*. Joint-tenants were distinguished from parceners in many points, particularly in this, that they came in by purchase, that is, by the act of the parties, and that the surviving tenant in joint-tenancy, was to have the entire estate to himself, whatever it was.

Bract fol. 28. 428. Britt. c. 35. Flet. l. 3. c. 4. Litt. s. 280. Bract. fol. 430.

Tenants in common. Litt. s. 292.

Tenants in common were such as held lands or tenements in common, so as to take the profits in common. The principal difference between joint-tenants and tenants in common was, that joint-tenants had the land by one joint title and in one right, and tenants in common by several titles: thus, if one joint-tenant, or one parcener, aliened in fee to another man, the alienee held in common with the other joint-tenant or parcener, because they came in by different titles or feoffments. Neither joint-tenants nor tenants in common were at this time compellable to make partition, but the common law on this point was afterwards altered by statute.

Ibid. 309.

Ibid. 290. 318.

CHAPTER XXVI.

EDWARD IV.

Modes of Conveyance.—Gift, Feoffment, and Grant.—Livery of Seisin. — Fines. — Recoveries. — Uses. — Lease. — Release.— Lease and Release.—Confirmation.—Exchange.—Surrender.— Defeasance. — Attornment. — Different kinds of Possession.— Droit Droit.—Ousters of Freehold.—Disseisin.—Intrusion.— Abatement.—Deforcement.—Remedy against Disseisin.—Entry. —Continual Claim.—Congeable Entry.—Descent that tolled Entry. — Discontinuance. — Remitter. — Abeyance. — Personal Property.— Contracts.— Criminal Law.— Treason.— Murder. —Larceny.—Voluntas reputabitur pro Facto. — Challenges.— Principal and Accessory.

Modes of conveyance.

FROM the consideration of the nature of estates, we are led to that of the modes of creating and conveying estates, as also of many other particulars respecting them, the law of which had undergone some change since the period when this subject was treated of.

Gift, feoffment, grant. Ante, p. 91. Bract. fol. 53.

A gift, *donatio*, was, as before observed, the original term for the principal conveyance, but we find from Bracton that the term *feoffamentum*, feoffment, had come into use in his time, and was applied to a gift of corporeal hereditaments, as lands and tenements, which distinction is expressly confirmed by Britton, a subsequent writer, who says, "done est nosme generall plus que n'est feoffment, car done est generall a touts choses moebles et nient moebles, feoffment est riens forsque del soyle." From Littleton we learn that the terms gift, feoffment, and grant, were in common use in his time. A gift was not confined to a gift in tail; a feoffment, originally employed to signify *donatio fædi*, was now

Brit. c. 34.

Litt. s. 57. Ante, p. 91. Litt s. 1.

Litt. s. 57.

used to signify the gift in fee of corporeal hereditaments, and grant *concessio*, a term of later introduction served to denote a similar gift of incorporeal hereditaments, as advowsons, commons, and the like. He who made a gift was called the donor; he to whom the gift was made, the donee; he who made a feoffment was the feoffor, and he to whom it was made, the feoffee; and by the same rule the grantor was distinguished from the grantee.

Livery of seisin.

Bract. fol. 41.

Ante, p. 13.

Co. Inst. 48.

Britt. c. 33.

Flet. l. 3. c. 55.

Between the gift, feoffment, and grant, there was a further distinction as to the mode of performing the conveyance. The two former required the solemnity now called livery of seisin, which by Bracton is particularly described under the name of *traditio seisinæ*. Livery of seisin was now, as in his time and also before, performed by some solemn act, as by delivery of the ring of a door or of a turf and the like, which Lord Coke calls livery in deed, when the feoffor and feoffee or their attornies, both holding the deed of feoffment, and the ring of the door, &c. the feoffor says, "Here I deliver you seisin and possession of this house in the name of all the lands and tenements contained in this deed, according to the form and effect of this deed." Livery might also be performed by words without any ceremony or act, as if the feoffor being at the house-door said, "Here I deliver you seisin and possession," &c. There was likewise what Lord Coke calls livery in law, when the feoffor said to the feoffee, being within view of the house or land, "I give you yonder land, &c. to you and your heirs." This appears to have been the same in Bracton's time, for he speaks of "seisina per effectum et per aspectum."

Co. Inst. 48.

Bract. l. 2. c. 18.

Litt. s. 59.

It is necessary to observe, that in all cases where a freehold should pass, whether by deed or without deed, it was needful to have livery of seisin, as in a lease for a term of life; but in a lease for a term of years it was not necessary, because in this latter case no freehold should pass.

Bract. fol. 54.

In regard to incorporeal things, as they were neither tangible nor visible, they could not pass by livery; but it appears, that in Bracton's time they passed by the agreement

of the parties agreeing together, with a view of the thing to which it belonged, and confirmed by the actual uses of the incorporeal thing. Thus an advowson might be given by a view of the church to which it belonged, and when the donee had actually exercised his right of presenting to the church, he acquired seisin. At the period we are now treating of, incorporeal things could not be granted but by deed, whence arose the distinction between things lying in grant and passing by livery.

Litt. s. 183. Co. Inst. 121.

Besides, it was necessary in all feoffments and grants to have these words, "to have and to hold to him and his heirs," for these words "his heirs," made an estate of inheritance. For if a man purchased lands by these words "to have and to hold to him for ever," or by these words "to have and to hold to him and his assigns for ever," in such case he would have only an estate for life.

Litt. s. 1.

Of fines, as a mode of conveyance, sufficient has already been said to explain its nature and properties. Lord Coke observes, that a fine was a feoffment of record.

Fine.

A recovery was now beginning to be turned to the use of conveying lands, which has since been distinguished by the name of a Common Recovery. Recovery, in Latin *recuperatio,* signifies generally the restoration of any thing by the judgment of a court of law. A recovery might either be real, when it was obtained upon a real plea; or feigned, when it was given upon a default or feigned plea set up by the tenant.

Common recoveries.

Plowd. 57. 436.

As judgments, whether obtained upon a real or a feigned plea, were of equal force and efficacy to vest a free and absolute estate in fee simple in the recoveror, feigned recoveries were frequently resorted to as a mode of transferring an estate which could not be conveyed by any other form of law, and are said to have been first employed by the ecclesiastics to elude the statute of Mortmain. To prevent such collusive transfers to the clergy, the statute of West. 2 and Gloucester, made several express provisions for the prevention of feigned recoveries by tenant in dower, by the curtesy

Stat. West. 2. 13 Ed. I. c. 32.

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or in tail, after possibility of issue extinct, or by tenant for life, to the injury of the reversioner or of the termor. Although there was no express provision by statute to protect the issue in tail against a recovery suffered by the donee, yet so thoroughly did the courts concur in the view of the nobility, at whose instance the statute *De Donis* was passed, that, according to the spirit rather than the letter of that act, for many years they discountenanced feigned recoveries, especially where they were to the prejudice of the issue in tail. Thus we find, that even as late down as the preceding reign, when a writ of right was brought against the tenant in tail and he made default, the court, though compelled to pass judgment, because the whole proceeding was strictly according to the forms of law, yet did so with extreme reluctance. Nevertheless, as the opinion had now once been entertained, that a recovery would have the effect of barring the issue, it is not surprising to find, that it had gained a footing in this reign, particularly as a new device had been hit upon that served more thoroughly to conceal the nature of the proceeding from the court; this was by the tenant making his defence, and vouching over a warrantor who made default, when judgment was given for the tenant against the warrantor, and for the demandant against the tenant. The decision of the court, in a case well known by the name of Taltarum's case, is generally looked upon as having set this question at rest, it having there been unanimously held, that a recovery by default of the vouchee was a bar to the issue in tail, founded on the principle already admitted, that the tenant might recover a recompence in value from the vouchee. From this period recoveries became more and more general, until they were recognised as a regular mode of conveyance, retaining at the same time all the forms of a judicial proceeding as they had when they were real actions.

Stat. West. 2. c. 3, 4. Stat. Glouc. c. 7. 11.

3 Hen. 6. 55. Reeves' His. iii. 327.

12 Ed. 4. 14, 15. 19.

Uses.

Another mode of conveyance very similar to recoveries, was that of uses, the invention of which is also ascribed to the ecclesiastics, for the purpose of evading the statute of

Mortmain. Although no mention is made of them in this statute, yet the circumstance is probable, as the practice of uses is evidently derived from the civil law, and answers to the *Fidei-commissum* of the Romans. By the Roman law, many persons were incapable of being constituted heirs, such as exiles, unmarried persons, and those who had no children. Wherefore it had become the practice to convey the inheritance to one person in confidence, that he should dispose of the profits at the will of another; which was called *fidei-commissum*, the person so constituted heir being named *hæres fiduciarius*, and the person for whose benefit the devise was made *hæres fidei-commissarius;* who, having, as the Roman lawyers called it, a sort of right by curtesy, *jus precarium*, could have no remedy by the law against those who chose to convert the property so devised to them, to their own use. The emperor Augustus first favoured the interests of such heirs, and directed the consuls to take cognizance of cases, where a breach of trust was complained of, in consequence of which one pretor, called *fidei-commissarius*, was appointed to hear and determine causes of that kind. In the reign of Claudius two pretors were chosen, and the emperor Justinian extended still further protection to the *hæres fidei-commissarius*, by a law requiring all persons who were constituted heirs for the benefit of others to execute the trust reposed in them, unless they could prove that the testator had not created a *fidei-commissum*.

Bacon on Uses, 19.

Just. Inst. l. 2. tit. 23. s. 1. Brisson. de Form. Rom.

Ibid. l. 2. tit. 23. s. 2. Cruise on Real Prop. i. 356.

Just. Inst. l. 2. tit. 23. s. 12.

On the introduction of uses into England, the *cestui que use*, or the person to whose use the estate was raised, was, like the *hæres fidei-commissarius* of the Romans, entirely dependant on the good faith of the party to whom the estate was conveyed, and would have had no remedy, if the Chancery, by its equitable jurisdiction, had not furnished him with one. To this end, the writ of subpœna, as before observed, is said to have been invented, or, more properly, first employed, by John de Waltham, bishop of Salisbury, whereby feoffees to uses were compelled to answer in this court respecting such trusts; and upon the truth of the

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matter appearing, the chancellor would decree such execution of the use, as the feoffee in conscience was bound to make. It was originally held, that a subpœna lay only for the feoffee, and not for his heir and alienee; but it appears that, in the preceding reign, it would lie against the heir, and all such aliences as had purchased without a valuable consideration, or with an express notice of a use; but a purchaser for a valuable consideration, without notice, might hold the lands discharged of the use.

22 Ed. 4. 8. Keilw. 42. Keilw. 46. Bac. on Uses, 312.

Uses might be assigned by secret deed between the parties, or be devised by last will and testament; for, as the legal estate was not transferred by these transactions, any instrument declaring the intention of the parties was binding in equity.

Bro. Abridg. tit. Feoff. al Use. 31.

Uses were not liable to any of the feudal burdens, particularly not to escheat or forfeiture, wherefore they were so frequently resorted to during the civil wars between the houses of York and Lancaster, for the protection of private families from the effects of attainders which followed the triumphs of either party.

Another circumstance attending a use was, that no wife could be endowed, nor husband have his curtesy for a use; for the *cestui que use* had no seisin of the land, wherefore it became customary, when estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the original of the modern jointures.

Lastly, a use could not be extended by *elegit*, or any other process at common law, for the debts of *cestui que use*; "for," observes Mr. Justice Blackstone, "being merely the creature of equity, the common law, which looked no further than to the person actually seised of the land, could award no process. A use was, in fact, a species of property totally unknown to the common law, and in consequence of the abuses to which it had given rise it had been eyed by the legislature as a fraudulent proceeding, against which several enactments were made in the reigns of Edward III.,

Bro. Ab. tit. Execution.

Bacon on Uses.

Ante, p. 262.

Richard II., Henry IV., Henry VI., to render the lands of *cestui que use* liable to be extended by his creditors.

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That the common-law courts should be disinclined to take cognizance of any such proceedings may naturally be accounted for from the light in which they viewed this transaction. As low down as the 7th of Henry VI. we find it stated by one of the judges, that if a man made a feoffment, with a proviso that he himself should take the profits, it was a thing not allowed by law, and altogether void: but, towards the latter end of this reign, it was held, that such a feoffment to the heir and a stranger, and to the heirs of the heir, was lawful, and no collusion. In the 4th of this king, we read, in a case where A. infeoffs B. to the use of A., that B. is, in the language of modern times, said to be seised of the land to the use of A., and who only infeoffed him to his use and confidence, upon which the court declared that, " In the Chancery, a man shall have his remedy according to the intent of the feoffment, and according to conscience; but, in the Common Pleas, and in the King's Bench, according to the course of the common law, it is otherwise, for the feoffee shall have the land, and the feoffor shall have nothing against his own feoffment, though it was only upon confidence." So strongly did the common law incline to favour the legal owner, that if the feoffee died, it was held that his heir became absolutely owner, discharged of the use. On the same ground, where the *cestui que use* was attainted, or died without a will, it was held, that the lord was not entitled to the use, nor was the heir; but it was thought that it should belong to the feoffee. Such was the state of the law of uses at common law and in equity at this period. There will be occasion to revert again to this subject hereafter.

7 Hen. 6. 43.

33 Hen. 6. 14.

4 Ed. 4. 8. Reeves' Hist. iii. 365.

Bro. Feoff. al Uses, 34. 2 Comm. 331.

Lease.

A lease, from the French *laisser*, and the German *lassen*, to let, or give leave, was a conveyance by which an estate for life, for years, or at will, was created. These estates were originally granted to husbandmen, who every year rendered some equivalent in provisions or money, in the

Bract. fol. 26.

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shape of rent, to their lessors or lords, and were for some time but little considered in law, as they amounted to little more than a leave or permission to hold the land at the will of the owner; and those who held them being for the most part in the condition of villeins, were regarded in no other light than servants or bailiffs of the lord, to whom they were expected to account for the profits at a stipulated rate. But, as it was soon felt that the cultivation of the land required the occupier to have a more permanent interest in the soil, these husbandmen gradually acquired a larger estate, and the length of leases was considerably increased. The Mirror says, that, by the ancient law, no leases were granted for longer than forty years; but this appears to be one of the unauthorized assertions of that writer; for Bracton, who wrote at a much earlier period, speaks of leases indefinitely long, exceeding the term of human life; and Madox, in his collection, gives examples of leases for eighty years and longer; and, in the time of Edward III., they were extended to some hundreds of years.

Mir. c. 2. s. 27.

Bract. ubi supra. Mad. Form. Arglican. No. 239, 245.

32 Ass. 6.

In proportion as the feudal restraints were removed, and wealth began to be circulated among the different classes of the community, this kind of temporary estate was more readily granted by lords, and more eagerly sought after by tenants; wherefore it naturally grew into consideration in law. Provision was made by the stat. of Gloucester to protect the rights of termors against the effects of recoveries; and it appears, as before observed, that a lease for the term of life, in the time of Littleton, was the next estate in value to a gift in fee whereby a freehold passed; and that to give effect to this conveyance, livery of seisin was necessary.

Stat. Glouc. 6 Ed. 1. c. 12.

Ante, p.370.

Release.

Ante, p. 92.
Litt. s. 445.

A release was an old mode of conveyance, as before mentioned; which, by Fleta, is termed *charta de quieta clamantia*. Releases were of two kinds, namely, a release of all the rights which a man has in lands and tenements, and releases in actions. A release, in the first sense, might enure or take effect in four different ways, viz., 1. By way of *mitter l'estate*, that is, of passing an estate, as when one

Ibid. 305.

of two coparceners released all his right to the other; this was to enure to make an estate. 2. By way of *mitter le droit*, that is of passing a right, as when a man released to a disseisor all his right, whereby the disseisor acquired a right, and his estate, which was before wrongful, was made lawful. 3. By way of extinguishment, as when a lord released to his tenant all the right he had in the seigniory; this went to the extinguishment of the rent. 4. By way of enlargement, as where there was tenant for term of years or life, remainder to another in fee, and he in the remainder released all his right to the particular tenant and his heirs; this gave him an estate in fee simple. To make releases operate in this manner, it was necessary that the releasee should be in actual possession, so that there might be a privity of estate between the lessor and lessee, and that there should be words of inheritance in the deed. From this last property of releases, these might be occasionally, and were at this period, used as a means of transferring the freehold. When any one wished to enlarge the estate of another, a deed of lease for three or four years was made to the party intending to purchase, and soon after he had entered on possession, a release of the inheritance was given him, by which he became seised of the fee simple, the same as by feoffment, with livery of seisin. This afterwards became an established mode of conveyance, under the name of lease and release.

Litt. s. 304. Ibid. 479. Ibid. 465. Ibid. 459.

Lease and release.

32 Hen. 6. 8. Reeves' His. iii. 365.

A confirmation is another old form of conveying the freehold, the properties of which were now more nicely defined. It originally signified the strengthening of an estate already created; but it sometimes acquired, by the addition of certain words in the deed of confirmation, the force of enlarging an estate. At the period we are now treating of, a confirmation possessed many of the properties of a conveyance; and is defined by Lord Coke to be the conveyance of an estate or right *in esse*; whereby a voidable estate was made sure and inavoidable, and a particular estate was increased and possession perfected. "Confirmatio," says Bracton,

Confirmations.

Inst. 295.

Bract. l. 58. Flet. l. 3. c. 14.

"omnes supplet defectus." But although it might make a defeasible estate good, it could not work upon one that was void in law.

Britt. c. 35. 10 Ed. 2. 24. Litt. s. 531.

The proper words of a confirmation were, *dedi concessi et confirmavi*; but the words *dedi* and *concessi* had the same force as *confirmavi* in some cases; as when the disseisee made a deed to the disseisor, with the words, *quod dedi* and *quod concessi*, such a deed was a confirmation. Bracton also alludes to the same thing.

Bract. 59. Litt. 532, et seq.

A confirmation had many properties in common with a release, and also many points of difference. If a disseisee confirmed the estate of the disseisor, it was good for ever; though the confirmation was only for life or years, or even for a day, still he confirmed his estate, which was a fee simple. In this, a release and a confirmation agreed, except that, in the case of a confirmation, it was not necessary for a disseisee, as in the case of a release, to specify the estate he meant to give; for, when the disseisor's estate was confirmed, he had then a fee simple. A deed of confirmation was in some cases good and available when a release was not; as if a man let to another, for term of his life, who let the same for a term of forty years, by force of which he was in possession, if he by his deed confirmed the estate of the tenant for years, and after the tenant for life died during the term of years, he could not enter into the land during the said term. So, if a disseisor made a lease to another for term of years, and the disseisee released to the termor, the release was void; but a confirmation would have been good and effectual.

Ibid. 516.

Ibid. 518.

Exchange.

Ante, p. 92. Litt. s. 65.

An exchange like the two preceding, was, as before shown, a very frequent mode of conveying estates, the properties of which were defined at this time. An exchange of tenements, without deed or without livery of seisin, was good, provided the estates which both parties had in the lands so exchanged were equal; that is, that if the one had a fee simple in the one land, the other should have a like estate in the other; but of things that lay in grant, it was necessary that it

Co. Inst. 51.

should be made by deed. The word *excambium* was requisite, as it could not be supplied by any circumlocution. Besides, it was necessary that there should be an execution by entry or claim in the life of the parties.

Surrender.

Surrender, *sursum redditio*, was, as the term imports, the rendering or delivering up an estate, of which there were two kinds mentioned in this day; namely, the surrender by custom of lands holden by copy, or customary estates in the lord's court, as before described; and the common-law surrender, which is defined by Lord Coke to be the yielding up an estate for life or years to him that had an immediate estate in reversion or remainder, wherein the estate for life or years might drown by mutual agreement between the parties. A surrender might be made without livery of seisin, but it was necessary that the surrenderer should be in possession.

Ante, p. 367. Litt. s. 336. Inst. 338.

Co. Inst. 50. Ibid. 338.

Defeasance.

Defeasance, or defeazance, from the French *defaire*, to defeat, was an indenture or deed made at the same time with a feoffment, or any other conveyance, which contained certain conditions, upon the performance of which the estate might be defeated. Bracton appears to allude to such defeasible estates when speaking of any donation made by a person under the influence of fear. That this mode of conveyance was in use at this period, and long before, although not expressly mentioned by name, may be gathered from Littleton.

Co. Inst. 236.

Bract. fol. 16, 17.

Attornment.

Connected with the subject of conveying estates was that of attornment, the general nature of which has already been explained at a time when, although not mentioned by Glanville, it might be supposed to form a part of the feudal system of England, as it was known to do of that of other countries. Bracton, and subsequent writers, treat of it as far as regards the agreement of the tenant to the grant of a lord; but the subject was now considered more at large, and in different points of view. An attornment was either express or implied. An express attornment was when the tenant, after hearing of the grant, said, "I attorn to you;

Ante, p. 86.

Litt. s. 551. Bract. fol. 81. Britt. 105. Flet. l. 3. c. 6.

I agree to, or am content with, the grant;" or words to that effect; and then delivered to the grantee a penny, by way attornment. An implied attornment, or an internment in law, was, in divers cases, as the acceptance of a grant by the husband of the grantee, or the payment of rent or services to the grantee; these were among the number of attornments by law. To both these kinds of attornment there was this inseparable incident, that the tenant was to have notice of the grant; and therefore it was adjudged, that if a bailiff of a manor, who used to receive the rents of the tenants, purchased the manor: and the tenants, having no notice of the purchase, continued the payment of the rents to him, this was no attornment.

Litt. s. 559, et seq. Co. Litt. 310. Litt. 566. Co. Inst. 309.

Litt. s. 551.

An attornment was to be made in the life of the grantor and grantee, or the grant was void; but such was the force of attornment, that if the lord made a second grant, and the tenant attorned to the second grantee, he would have the services, and a subsequent attornment to the first grantee would be void.

Ibid. 554, et seq.

None ought to attorn but he who was immediately privy to the grantor; thus, if the tenant made a lease for life, or in tail, reserving a reversion to himself, the reversioner, and not the lessee for life or in tail, was to attorn; for he in the reversion was tenant to the lord; so in case of lord, mesne, and tenant, the mesne was to attorn, and not the tenant peravail; but, on the grant of a rent-charge or rent seck, it was otherwise, for the tenant of the freehold in that case was to attorn although there was no privity.

Ibid. 556.

Besides the grant of seigniories and rent, wherein the law of attornment was agreeable to ancient practice, Littleton speaks of attornment in other cases: as when a man let lands for term of years, and then granted the reversion to another; if the tenant for years did not attorn to the grantee, the grant was void; but, if he did attorn, then by such attornment the freehold would pass to the grantee without livery of seisin: the same was the case in the grant of a remainder. Where a grant was made by fine, a grantee might do more

before attornment than where the grant was made by deed; for a conusee by fine before any attornment might take benefit thereof, to have the wardship of the body or lands, to take a heriot or the tenancy, by way of escheat and the like; but the lord could not distrain for relief, because no action could be sued without attornment. This doctrine of attornment, though flowing as a natural consequence out of the feudal system, nevertheless survived the abolition of military tenures, and continued until lately to form a complicated branch of the law.

Co. Inst. 318. Litt. s. 579, et seq.

Different kinds of possession. Bract. 159, 160.

Having taken a general view of the state of the law respecting the creation and conveyance of estates, we have next to consider the various manners in which possession to estates might be lost. For illustrating this point, recurrence may be had to the early writers, when cases of wrongful possession were most frequent, and the law respecting them was more thoroughly discussed. Bracton, in defining the title to lands and tenements, discriminates nicely between the different degrees of *possessio*, *jus*, and *proprietas*. According to him, there was a *nuda pedum positio*, as in the case of intrusion, where there was *minimum possessionis* and *nihil juris*. Another sort of possession was clandestine and precarious, inasmuch as it was gained by violence; this had *parum possessionis* and *nihil juris*. A third had *aliquid possessionis* and *nihil juris*, such as that which belonged to a term of years, where only the usufruct was enjoyed. Sometimes there was *multum possessionis* and *nihil juris*; as in an estate for life, by dower, and the like. When a person had the freehold and the fee, he had *plus possessionis* and *multum juris*. When a person had the freehold, the fee, and the property, then he was said to have *plurimum possessionis* and *plurimum juris*, or the *droit droit*, as it was otherwise called.

Droit droit. Bract. 372.

Ousters of freehold. Mayn. 341. Year-books, Ed. 3. and Hen. 6. passim.

When any one gained the possession without the *jus*, or title, this wrongful possession had acquired, even in the reign of Edward III., the name of ouster of freehold, or ousting a person of his freehold, of which there were dif-

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ferent kinds, as disseisin, intrusion, abatement, and deforcement.

Disseisin. Ante, p.118. Co. Inst. 266.

Disseisin, the first and most important of these ousters, was, as before observed, the depriving one of his seisin. Seisin was a term of strictly feudal import, denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be instituted. This might be either in deed, as by the tenant who was in actual possession; or in law, as by those who were in remainder or reversion. Disseisin, therefore, in the first instance, implied literally the turning a man out of his seisin, and usurping his place and relation; but the term was afterwards extended to any action which obstructed a person in the use of his freehold; as, if any one dug in another's land, or put sheep thereon, under a claim of easement; this was disseisin in the time of Glanville, and subsequently; but it was necessary, in order to constitute any act a disseisin, that it should be accompanied with a claim, otherwise it was a trespass. Agreeably to this view of disseisin, the denial of rent, or the preventing a landlord from taking distress for his rent, was held to be a disseisin; and so likewise, in order to avail oneself of the more commodious and easy remedy by assize, a person might also suppose or admit himself to be disseised, when, in reality, he was not, which was called disseisin by election.

Bract. fol. 216. Brit. c. 4. Flet. l. 4. c. 1. Mir. c. 2. s. 1. Litt. 588.

Intrusion. Bract. 160.

Intrusion, in Latin *intrusio*, was another species of ouster of the freehold, which is explained by Bracton to be an unlawful entry into lands or tenements, which were void of any possessor by him, who had no right whatever to the same; and, in his time, it appears, that intrusion might be to the prejudice of the heir, or of him in reversion or remainder; but afterwards this term was confined to the ousting of him in reversion and remainder, as distinguished from abatement. An intrusion differed from a disseisin in this, that the intrusion was a wrongful entry where the possession was vacant; but disseisin was the wrongful putting him out of his freehold who was in actual possession.

Flet. l. 4. c. 30. Britt. c. 51. Old Nat. Bre. 90.

Abatement. O.N.B. 91. 115. Litt. s. 475. Co. Inst. 277.

Abatement, in the sense of an ouster, was a species of intrusion; as when a man died seised of an estate of inheritance, and between the death of the ancestor and the entry of the heir, a stranger interposed himself, and intruded. An abatement therefore differed from an intrusion in this, that the entry and interposition of the stranger was consequent upon the descent or devise of an estate in fee simple; but, in the case of intrusion, it was consequent upon the determination of a particular estate, the former being to the injury of the heir or devisee, and the latter to that of the remainder-man or reversioner.

Deforcement. Co. Inst. 277.

Deforcement, in Latin *deforciamentum*, signified properly according to the derivation of the word, a casting out with force, and seemed to comprehend, in its most extensive sense, the forcible withholding any lands or tenements to which another had a right, so that it included in it all the other species of ouster of freehold. Bracton applies the term to the disturbance of a person in his presentation, so as that he was driven to the assize; but expressly adds, that to constitute a deforcement, the disturber need only interrupt him who had the right of presentation, without expressly depriving him of the seisin. The term deforcement was also sometimes employed for the withholding dower from the widow, for which she had the writ called *quod ei deforceat.* In its restricted sense, therefore, the word deforcement denoted every kind of forcible detainer of the freehold which was not comprehended within any of the abovementioned terms. If the tenant in tail enfeoffed another in fee, this was a deforcement, for the feoffee had no rightful estate in the tenements, although he was in by course of law.

Bract. 238. Brit. c. 53. Flet. l. 5. c. 11.

Stat. West. 2. c. 4.

Litt. s. 614.

Remedy against disseisin. Bract. 160.

Time in the eye of the law gave a *vestimentum*, a sort of feudal investiture to the most imperfect possession. This was necessary, not only on the feudal ground, that there must be a tenant to the land to do the services, but also to give quiet to men in the enjoyment of their possessions. Nevertheless, in the case of disseisin, while the act was fresh,

Bract. 162.

the law at an early period allowed of the injured party to take summary redress by forcibly expelling the wrong-doer. This was, however, to be done *incontinenter flagrante disseisinâ et maleficio*, and if the disseisee suffered a longer time to elapse than was necessary, he gave up his right of entry, and lost both his natural and civil possession as it was called, which were thenceforward in the disseisor, who could not afterwards be ejected but by judgment of law. Such forcible entries appear to have been allowed until the reign of Richard II., when they were prohibited by statute.

Ante, p.330.

Entry.

Bract. 163.

As to the time within which the disseisee was allowed to make his entry, it appears at first not to have been defined. If the owner was present at the time he was to eject the disseisor that very instant, or as soon as he possibly could. Bracton supposes he ought not to exceed fifteen days, the time allowed to a tenant summoned in a writ of right. If he were absent, the time allowed depended on the distance the party was gone, that is, if he were abroad in Gascony, he had forty days, and if gone on a pilgrimage to the holy land, he was allowed from one to three years, according to circumstances. This was afterwards altered, and in the reign of Edward III., the time for making an entry began to be limited to a year and a day; a legal period of time importing the space of a complete year, which had been adopted from the feudal system, and was applied to the performance of various acts in our law. Within this period the feudal services were required, and within this period also the king retained the lands of persons convicted of felony; so likewise in other cases.

Bro. Cong. Ent. 85.

Gilb. Ten. Co. Inst. 250.

Entry might be made by only setting foot upon the land, and where a party was deterred from making his entry, either by fear of death or maiming, he might make his claim, and thus secure to himself the right of entry, and all the advantages accruing therefrom. We read of a claim in the place of an entry in the reign of Edward III., when it was adjudged sufficient if it were made by parole among the neighbours, in order to have the effect of continuing to the

22 Ed. 3. 15.

Continual claim.

heir the right of bringing an assize instead of being driven to his writ of entry. In Bracton's time the assize could not be prosecuted by the heir of the disseisee, unless it had already been commenced by the disseissor himself, and proceeded as far as the view; this restriction was now rendered unnecessary, by the practice of making what was called continual claim, which is particularly described by Littleton. The party having a right of entry ought to go on the land or as near to it as he dare, and to make his claim as quickly as possible after the disseisin. This was to be continued within every succeeding year and day after the first claim during the life of the adverse party. The effect of this continual claim was, that the disseisee had the same seisin in the lands as if he had entered, and if the disseisor died seised in fee, and the lands descended to his heirs, yet the disseisee might enter on the possession.

Bract. 218.

Litt. s. 415.

Ibid. 419. 423.

Congeable entry.

Litt. s. 422.

So long as the disseisee maintained his entry by continual claim, his entry was said to be congeable; but so strict was the law in this particular, that if a day elapsed beyond the year and a day after the last claim was made, and the disseisor died on that day, the entry of the disseisee was taken away. The lands then descended to the heir of the disseisor, and this was called a descent that tolled entry. In this case, however, it was necessary that the disseisor should die seised in his demesne, as of fee or as of fee tail, for the dying seised for term of life did not toll entry.

Ibid. 426.

Descent that tolled entry.

Litt. s. 385, et seq.

Discontinuance.

When a party thus lost his right of recovering possession by entry and was driven to his action at law, the possession was said to be discontinued. Discontinuance from *discontinuo*, which signified as much as to interrupt the continuance, was a term applied, not merely to the case of the privation of the freehold, but also to several others, where the party who had right was prevented from entering in consequence of some alienations, as where an abbot aliened lands, and his successor, although he had the right, was driven to his writ *sine assensu capituli*; or where a man aliened lands which he had in right of his wife, she, at his death, could

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not enter, but was compelled to bring her writ of entry *cui in vita;* and so likewise tenant in tail enfeoffed another and died leaving issue, the issue could not enter, but must bring a *formedon.* These discontinuances are frequently mentioned in the reign of Edward III., and the law respecting them is very minutely laid down in Littleton.

24 Ass. 28. 36 Ass. 8. 18 Ed. 3. 12. Litt. s. 592, et seq.

Remitter.

Remitter was another subject connected with disseisin and discontinuance, which was handled very largely in this day. Remitter from remit, to send back or restore, was when a party was in by two titles, an elder title and a later one that was less worthy, and the law remitted or restored him to his first estate, as if tenant in tail discontinued and afterwards disseised the discontinuee, and so died seised, the law remitted him to his first estate. In the year-books of Edward III., he is said to be "en son primer estate, en son meliour droit, en son meliour estate," or as Littleton expresses himself, "he was adjudged by law to be in by his *pluis sure* title, and *son pluis digne* title, for the modern term title, in Lat. *titulus* from *tueor* to defend or maintain, signifying that by which one maintains one's right, was now used as it has been since, to denote that peculiar right by which a man came to his lands and tenements, as by fine, feoffment, &c.

25 Ass. 4. 35 Ass. 11. Litt. s. 659.

Abeyance.

Another point connected with the right of entry was that of abeyance, in Fr. *abeiance,* from *bayer* to gape after, signifying expectation or suspense. A thing was said to be in abeyance which was not in any one living, but only in the remembrance, intendment, and consideration of law, as if a man made a lease for life, remainder to the right heirs of J. S., the fee simple was in abeyance, or as it was sometimes termed, in *nubibus,* until J. S. died. In consequence of the feudal principle, which required that there should always be a tenant to the freehold, it became an established maxim that the freehold could never be in suspense, or abeyance; but although the freehold might not, yet the inheritance it seems might, in certain cases, be in abeysance; as in the case of a parson, bishop, abbot, and every sole corporation or body politic: which inheritances are

Litt. s. 646. Co. Inst. 342.

40 Ed. 3. 39.

called by Bracton *hæreditates jacentes*, and Britton says of them, "que le fee est en balance."

The remedy by means of entry or claim, although hitherto spoken of only in relation to disseisin, applied equally to the injuries of intrusion and abatement; for, as the original entry of the wrong doer was in all these cases unlawful, they might therefore be remedied by the mere entry of him who had right. So likewise this privilege might, as in the case of disseisin, be taken away by force of descent, and the parties be driven to their action.

Bract. l. 1. c. 2.

Personal property.

The law respecting personal property began now to be more thought of, and more clearly defined. Bracton, like his predecessor Glanville, had adopted the doctrine and language of the civil law, which he calls the law of nations, that is, the universal law of nature and reason. These principles were in several points adopted and moulded into our scheme of jurisprudence. In regard to game, the decisions of courts favoured the principles of the civil law more than that of the forest law; holding that animals *feræ naturæ*, such as birds, beasts, fishes, belonged to no one except by the right of occupation. Even the keeping of deer in a park or warren did not give the owner a complete property in them, unless they could be distinguished by some mark, as the colour and the like. Although the owner *ratione soli* acquired such a property in deer or hares, that he might sustain an action of trespass for any injury done to them, yet still, as Mr. Reeves observes, he was not at liberty to call them *lepores suos*, or *damas suas*, but in general *mille lepores*, or *damas vigenti*, &c. Nay more, a gift could not be made of a deer unless it was a white or tame deer in which a man could have a clear property.

8 Ed. 4. 14.

Reeves' His. iii. 370.
3 Hen. 6. 55.
7 Hen. 6. 38, et seq.

The principle of the civil law which gave to the owner a property in any accession which a corporeal substance received, either by natural or artificial means, was fully recognised. If a sow in pig was taken by way of distress and then pigged, the owner might have a replevin of the pigs as well as the sow, and might recover damages of both: but

Bract. 10.

the right of the soil superseded the law of accession; for if a man planted a tree in another man's ground, or by any accident it took root there, it became the property of the owner of the soil. So, if a man built a house with another man's materials on his own ground, the house was his and could not be taken down to indemnify the party. On a similar principle, if a man came into the freehold of another, and cut trees and made timber of them, the property was considered as remaining in the owner of the soil until the timber was carried away.

35 Hen. 6. 2.

7 Ed. 4. 4. Reeves' His. iii. 372.

Any one might seize the goods of the king's enemies, and also the goods of Englishmen taken by the enemy, to the exclusion of all other parties, even the owner himself, unless he claimed them on the day they were taken *ante occasum solis*.

Contracts.

3 Hen. 6. 36. 37 Hen. 6. 8.

As to bargains and contracts, it was a settled rule in law, that there should be a *quid pro quo*, a valuable consideration, otherwise it was a *nudum pactum*, to which the law would not give effect. But it was not decided by the courts, to what extent this rule might be applied. A promise to give a person a sum of money if he married his daughter was a contract, the validity of which was a matter of much dispute; but it was generally held throughout this reign, that an action of debt would not lie in such cases, because the defendant had not a *quid pro quo*, besides that the question belonged to a spiritual court.

14 Ed. 4. 6. 15 Ed. 4. 32.

A contract was not perfect without the agreement of both parties, so that if a person cheapened wares in a market, but did not pay the price agreed on, nor fix a day of payment, it was no bargain. A contract might also include things in *esse*, for a man might contract for the sale of all profits and tithes to his lands the next three or four years. Likewise the contracts of a servant, attorney, or factor, was binding on the principal, although the things never came to his hands. These principles were perfectly conformable with those which had been recognised at an early period.

17 Ed. 4. 1. 18 Ed. 4. 22. 21 Hen. 6. 43.

Criminal law.

Owing to the manner in which this king came to the

throne, during the life of Henry VI., a distinction was made between a king *de jure*, and a king *de facto*, as affecting the law of treason and other matters. It was now laid down as a principle, that a treason against Henry VI., while he was king, in compassing his death, was punishable after Edward IV. came to the throne. It was also settled, that all judicial acts, done by Henry VI. while he was king, and also all pardons of felony and charters granted by him, were valid, and that a pardon given by Edward IV. before he was actually king was void.

Treason.

Reeves' His. iii. 409.

19 Ed. 4. 1.

The crime of murder appears to have been distinguished in this reign much as it is now. The killing a man with malice prepense *felonico animo*, was held to be felony, as distinguished from that which happened *per infortunium*, or against a man's will. Some discussion and doubt arose in cases of larceny which occurred in this reign. A man was indicted for feloniously taking and carrying away a box with charters in it, but this was held to be no felony, because charters were considered as realty and not chattels real. At the same time it was laid down, that larceny could be committed only of chattels personal. It was likewise determined, by all the judges, after much discussion and deliberation, that generally, where goods were bailed to another, and he took them away, he could not be held to take them feloniously; but that when a possession so obtained had once determined, then the bailee might commit felony in taking them, as if a man bailed goods to another to carry them to his house, which he performed, and afterwards took them, it was felony, because his possession under the bailment ceased when he delivered them at the house.

Murder.

6 Ed. 4. 7.

Larceny.

10 Ed. 4. 14.

Reeves' His. iii. 110.

13 Ed. 4. 9, 10.

The old maxim of our criminal law that *voluntas reputabitur pro facto* was now beginning to yield to a contrary opinion. Even as late as the reign of Henry IV. it was laid down as a rule, that if a man was indicted that *il gesoit deprædando*, it was felony; but in the 9th of this king we find a contrary doctrine maintained. A man lay in wait in the road with his sword drawn, to set upon a person,

Voluntas reputabitur pro facto.

13 Hen. 4. 8.

9 Ed. 4. 28.

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and actually demanded the money of one whom he met, yet being interrupted at the moment, and not having taken the money, this was adjudged not to be felony. This principle was afterwards established and became a rule in law.

Challenges. Ante, p.286.

In the reign of Edward III. it was held, that if a felon challenged thirty-six jurors peremptorily, he should be treated as one who refused the law; but it was afterwards agreed, that a felon in an appeal might challenge thirty-five. In this reign it happened, that a prisoner, arraigned for coining, challenged thirty-one jurors, and after forty tales were returned, the prisoner stood mute; but, having before pleaded guilty, he was put upon his trial, found guilty, and hanged.

15 Ed. 4. 33.

Principal and accessory. Reeves' His. iii. 413.

The law in regard to principal and accessory was departed from in this reign, but on what ground does not appear. In the eighteenth year of this king two were indicted, one as principal, and the other as accessory. The principal was outlawed, but the accessory being taken, was tried, found guilty, and executed. Thus, contrary to the old law, an accessory was put to answer before the principal was attainted, and found guilty. What renders this case the more remarkable is, that the principal afterwards reversed the outlawry, and being put upon his trial was acquitted.

CHAPTER XXVII.

EDWARD IV.

Administration of Justice.—Judicature in Parliament.—Chancery.—Court of the Steward and Marshal.—Court of the King's Bench.—Pledges to prosecute.—Actions.—Real Actions.—Personal Actions.—Oral Pleading.—Declaration.—Imparlance.—Aide Prier.—Colourable Pleading.—Estoppel.—Garnishment.—Interpleader. — Mise.—Argumentative Pleading.—Negative Pregnant.—Duplicity of Pleading.—Protestation.—Departure in Pleading.—Year Books.—Fortescue.—Littleton's Tenures.—Statham's Abridgment.—Inns of Court.—Inns of Chancery.—Study of the Law.—Serjeants.—Apprentices.—Attorney and Solicitor-General.—Appointment and Salaries, &c. of the Judges.

Administration of justice. Reeves' His. iii. 108. Barringt. Obs. 419.

EDWARD IV. was interested in all judicial proceedings, and, according to the ancient practice of our kings, he not only sat in the courts of law, but took a part with his judges in the administration of justice. We are told, that in the second year of his reign he sat three days together in the court of the King's Bench, with the view of making himself familiar with the proceedings of the courts. He also went with his judges to try criminals in different parts, where, according to the writer of the history of Crowland Abbey, he administered justice with rigour, but with impartiality.

Judicature in parliament.

The judicature in parliament had not yet acquired a settled form. The proceedings were in many instances very irregular, and apparently too much controlled by the ruling parties of the day. Among the instances of irregularity and informality in their judicial process may be reckoned, that of the duke of Suffolk, who was impeached by the Common-

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in the 27th year of this king. This nobleman, being brought before the king and as many of the lords temporal and spiritual as were then in town, the chancellor put the question to him which way he would be tried; on which the duke, by way of reply, reiterated his protestations of innocence, and threw himself altogether on the king's mercy and award. Then the chancellor, by the king's command, pronounced the sentence, that, since the duke did not put himself upon his peers, the king was doubtful as to the treason; and as to the misprision, the king, not as judge by the advice of the Lords, but as one to whose orders the duke submitted himself, did banish him the realm and other his dominions for five years. This practice was perfectly conformable with the ancient practice which left all judgments to the king; but since the erection of parliament into a court of judicature, it had become unusual; wherefore the lord high constable stood up, and, on behalf of the bishops and lords, desired it to be enrolled, that this said judgment was by the king's own rule and not by their assent; at the same time requiring, that neither they nor their heirs should, by this example, be barred of their peerage and privilege.

Parl. Hist. ii. 273.

Notwithstanding the resolution of the peers in the reign of Edward III., that they would not sit in judgment on the Commons, yet it appears, that this rule had been deviated from, on more than one occasion, since that time. Among other cases, that of Sir John Mortimer in the 2d of Henry VI. is worthy of notice. He, having been committed to prison on a charge of high treason and made his escape, was indicted for the escape; and, on being again apprehended, he was brought before parliament and judgment given against him. A still more extraordinary proceeding passed in the 17th year of this king, when the Duke of Clarence, the king's brother, was, at the prosecution of the king himself, tried by the peers, and after sentence was pronounced, the execution was stayed, and the king directed the speaker of the House of Commons and the members to be called before the other house, when a rehearing of the whole matter was

Cott. Abrid. 651. Parl. Hist. ii. 287.

had in their presence. So unused were men, even at this day, to parliamentary interference, that it appears to have been thought a fit means of indulging private resentment, or party rage under the forms of a judicial proceeding. On the subject of parliament more will be said hereafter.

Parl. Hist. ii. 273.

Chancery.

The court of Chancery was now so far advanced in its jurisdiction, as to enable the legal historian to speak of its proceedings with greater certainty. It has already been stated in general terms, that the chancellor was invested at an early period with an authority to supply the deficiency of the common law, and to judge in certain cases which did not fall under any of the rules by which the common-law courts were ordinarily governed; but what was the precise nature of the cases in which the chancellor exercised his extraordinary jurisdiction is not to be learnt from the scanty records of those times before the reign of Henry VI., there being no earlier notices of matters determined in that court, except in regard to uses, which, as before observed, were peculiarly the subjects of an equitable jurisdiction, and gave rise to the employment of the writ of subpœna in Chancery. From the cases which this and the preceding reign furnish, it appears, that this court afforded relief to suitors for every species of hardship or injury, where there was either express fraud or breach of trust, for which the common-law courts afforded no redress. In the 37th Henry VI. a person bought up some debts owing to another and gave him a bond to the amount, but afterwards preferred a bill in Chancery, to be relieved from this obligation, on the ground that as choses in action were the subject-matter of the contract, and they were not transferrable, he had in reality received no consideration, and ought therefore, in conscience, to be discharged from the obligation. A grant was made by letter patent of goods forfeited by one that was attainted, and the grantee brought his bill in parliament against the person who then had the possession of them; because, as the king could not have an action at law for the goods of an outlaw, or one attainted, before they had been seized for the king's

Reeves' Hi. iii. 382.

37 Hen. 6. 13. Bro. Consc. 4.

39 Hen. 6. 26.

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use or found by record, much less could the grantee maintain a common-law action without having had the possession. So likewise in this king's reign there occur many other similar cases, as when a man was bound in an obligation to B. for the use of C. it was held, that C. should have a subpœna against the obligor. Also where one coparcener would not count according as the other had done: so likewise, where a man, having made a fraudulent gift to his creditors, and the person to whom they were given dying, a bill was filed against the wife compelling her to answer.

2 Ed. 4. 2.

6 Ed. 4. 10.

8 Ed. 4. 10.

Ante, p. 352.

We have seen that the Commons entertained a strong jealousy against the jurisdiction of this court, and that, in consequence of a petition in the preceding reign, a statute was passed on the subject of subpœnas. The common-law courts appear to have been infected with the same jealousy, and when they came in collision with the Chancery, they were no wise disposed to show any deference to the chancellor. This and the preceding reign furnish more than one example in which this temper was displayed. In the first case above mentioned, where the suitor prayed to be relieved from the obligation, although it was agreed to with the concurrence of all the judges in the King's Bench and Common Pleas, whom the chancellor consulted on the occasion; yet, notwithstanding, when this matter was afterwards pleaded to the obligation sued in the Common Pleas, the plea was overruled and the deed was held still to be in force. The chancellor had, as was supposed, only the power of committing the contumacious party, who was left at liberty still to prosecute his suit in the common-law courts.

37 Hen. 6. 13.
Bro. Consc. 4.

Reeves' His. iii. 382.

Another and more remarkable instance occurred in the 22d year of this king, when an injunction having been obtained in Chancery, after a verdict in the King's Bench, all the justices agreed in declaring, that they would give judgment if the party wished it, notwithstanding the injunction. It was moreover added, that the penalty to the injunction was not leviable by law, and that if the chancellor committed the party to prison, the justices would grant an *habeas cor-*

Reeves' His. iii. 385.
22 Ed. 4. 37.

pus and release the prisoner. Such was the unsettled state of the law at this time, and such was the conflict between those to whom the administration of justice was committed.

It has already been observed, that the chancellor followed the forms of the civil law in his court, and, as may naturally be supposed, he also followed the principles of the civil law, which furnished him with the best rules for equitable decisions. At the same time he was careful not to decide contrary to the common law, and therefore consulted the judges in the Exchequer chamber in all cases of doubt, and in some cases had also bishops and peers associated with him, besides the masters in Chancery, who were his ordinary assistants. Hence the chancellor's decrees ran thus, "per curiam Cancellariæ et omnes Justiciarios," or "per decretum Cancellariæ ex assensu omnium Justitiariorum et aliorum de concilio regis præsentium," and so on according to the persons by whose assent the judgment or decree was made. This course of proceeding was conformable with the practice in the time of Edward III., when references were made to the chancellor, treasurer, and others of the king's council. From this it is clear, that the Chancery, from the beginning, bore a closer affinity to the original *curia regis*, than the other courts, because the chancellor, by virtue of his office and dignity, stood in the nearest relation to the king.

Hist. Chanc. 40.

Ante, p 263. Pet. Parl. 70.

Before we close this account of the state of the Chancery at this period, it is worthy of observation, that pleadings in that court were not confined to the same strict rules as in the common-law courts. A person was not to be prejudiced for mispleading or for default of form; but might plead according to the truth of the matter, for awards were to be made according to conscience. The chancellor's power was distinguished into *potentia ordinata*, which was limited by positive law; and *potentia absoluta*, by which he used every means in his power to come at the truth, without being bound by the forms of the common law. The chancellor judged *secundum conscientiam*, and not *secundum*

Lord Ellesm. Off. Chanc.

9 Ed. 4. 15.

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allegatum; for, if the plaintiff supposed in his bill, that the defendant had done some wrong, and the chancellor of his own knowledge knew that he had done no wrong, the plaintiff could not recover *per cancellariam* against the defendant, although the latter made default; for the chancellor did not judge upon the default of the party, as the common-law courts did, but upon the truth of the matter.

By his ordinary jurisdiction, the chancellor held pleas in Latin, and the record, after issue joined, was sent into the King's Bench, to be tried by jury; but, by his extraordinary jurisdiction, he held pleas upon subpœna by English bill, except some few bills in French, to be found in the preceding reign.

20 Hen. 6.

The Chancery was not bound by any statute regulating the process of the common-law courts, unless it was expressly named. The Chancery was never adjourned, but was always open to suitors. It was not a court of record, inasmuch as it was a court of conscience, holding pleas upon subpœna; but when it tried matters upon *scire facias*, and the like, it was a common-law court, and a court of record.

9 Ed. 4. 14. Subp. 11.

Court of the Steward and Marshal.

Ante, p.352.

We have seen with what pertinacity the Commons urged their petitions against the courts of the Steward and Marshal; in consequence of which, some statutes were passed for the purpose of restraining this jurisdiction within its due bounds. By this means, this court continually declined in its importance; and, in proportion as its jurisdiction was restricted, that of the King's Bench was enlarged. These two courts had precisely the same origin, being both immediate emanations from the *curia regis*, and had accordingly many properties in common. They were both obliged to attend the king, *ubicunque tunc fuerit in Anglia*; and, as appears from a statute in the reign of Edward III., the King's Bench had an officer, by the name of the marshal, who travelled with it, and, like the marshal of the verge, attached the parties. The steward determined the king's own suits without writ, and had cognizance of all personal actions, *per inventionem plegiorum*. It is also clear, that

Court of King's Bench.

Stat. 5 Ed. 3.

Flet. 68, 69.

the proceeding by bill in the court of the King's Bench was very similar in its nature. These and other circumstances naturally tended to diminish the steward's jurisdiction, and to bring that of the Marshalsea, as it was afterwards called, within a very small compass.

As this court took cognizance of whatever respected the king's crown and dignity, it had, of course, more of a criminal than a civil jurisdiction, and was, as before mentioned, invested with the authority of attaching all defendants by the marshal of the court, which badge of distinction served also to define its jurisdiction; for the court refused to entertain suits against persons by bill, unless charged with being in *custodia mareschalli*. The year-books in the preceding reign furnish many cases that show what the old law was, and also the change that it underwent. In the 7th year of Henry VI., it was held, where a man was out on bail, that a bill could not be filed against him, as in custody: and unless some proof were on record of his being in custody, it lay at his option whether he would plead to the bill. But, notwithstanding this and similar decisions in the course of that reign, the court, in the 31st year of that king, decided that, if it appeared that the defendant was out on bail, it should be deemed sufficient. In consequence of this decision, it became the practice to suppose the defendant in custody, to file a bill, called afterwards a bill of Middlesex, or a *latitat*, and then, by a copy of the bill, to arrest the defendant, who gave bail to appear, after which he was deemed liable to plead to a declaration in any action. The cause of this change is ascribed to a desire on the part of the King's Bench to enlarge its jurisdiction, which was the evident effect of this course of proceeding, as it was thereby enabled to entertain suits of every kind. "The court of King's Bench," says an admired writer, "the sovereign court of original jurisdiction in criminal cases, was probably intended at first to have cognizance only of pleas of the crown, excepting in cases where the officers of the court were privileged, by reason of their attendance, to sue or be

7 Hen. 6. 42, et passim.

31 Hen. 6. 10.
32 Hen. 6. 4.

Co 2 Inst. 23.
4 Inst. 72.
Reeves' His. iii. 387.

Wynne's Eunom. Dial. iii.

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sued there in pleas of trespass or debt, or where persons were already under the custody of that court, and were to be charged with another suit. This last circumstance afforded an opportunity for this court, by a fiction, in order to warrant its proceedings in civil suits, to suppose every really unprivileged person to be already in the custody of the marshal. In this manner it has succeeded to bring every suitor within its jurisdiction." While on the subject of this court it is worthy of observation, that the proceeding by suggestion or surmise began now to be designated by the modern name of information.

35 Hen. 6. 27.

Pledges to prosecute.

A change, it seems, had already taken place at this period in the proceedings of courts, that removed one impediment to malicious or false prosecutions which the old law had provided. It has already been mentioned, in speaking of writs, that there was one clause, *si te fecerit securum*, &c. usually inserted, commanding the sheriff to receive pledges from the prosecutor, so that if judgment was given against him, or he deserted his suit, both he and they were liable to be amerced. Bracton expressly informs us, that there were to be two such pledges at least, and that they were to be such as were sufficient to pay the *misericordia*, if the complainant should retract his suit. The Mirror also speaks of these pledges as real and responsible persons; but it should seem that at this period the proceeding had dwindled into a mere form, and the pledges, in consequence, became merely nominal. The names of John Doe and Richard Roe, the nominal pledges, and the clause in the judgment sentencing them to amercement, are still remaining as vestiges of this ancient practice.

Ante, p.111.

Bract. 179.

18 Ed. 4. 9. pl. 19. Harg. Co. Litt 161. N. 297. Co. 4 Inst. 72.

Actions.

On the subject of actions there is little to be added to the account already given of them. Bracton distinguishes actions, in the language of the civil law, generally into *actiones in rem* and *actiones in personam*. These were now known by the appellations of real and personal actions; besides which, he speaks of mixed actions, which were both *in rem et in personam*. Real actions, or fœdal actions, as

Bract. 101, 102.

Mirr. c. 2. s. 6.

the Mirror calls them, were for the recovery of lands and tenements. Personal actions, were against the person, for the recovery of the thing in specie, or some compensation or equivalent, in the shape of damages. Of real actions, some were for the property, as the grand assize, in a writ of right; others for the possession, as the assize of novel disseisin, *mort d'ancestor*, and the like; as also the writs of entry of different kinds, each of which has been described before at the period when they are supposed to have come into use. Of this sort of action it will suffice here to observe, that the time was fast approaching when they were superseded by an action of a different kind, which was found to be a more convenient substitute for trying titles to lands. The action here referred to was the writ of *ejectione firmæ*, as it had been called since the reign of Edward III., which was afterwards called an ejectment. This, as before observed, was considered as an action of trespass, which went for the recovery of damages only; but it began, in the preceding reign, to be argued that, in an *ejectione firmæ*, the plaintiff should recover what remained of the unexpired term, as also damages for the time it was withheld from him. This opinion was afterwards confirmed into law by the decisions of the courts in the reign of Henry VII., from which period it was employed for the purpose above stated, as will be shown more at large hereafter.

Real actions.

Ejectione firmæ.

21 Hen. 6. 8. Reeves' His. iii. 391.

Personal actions comprehended actions of debt, detinue, covenant, account, trespass, actions on the case, and some others, the properties and applications of which have been noticed at different periods, as they came more and more into use. This sort of action naturally rose into consideration in law in proportion as new questions respecting personal property were started, and new injuries called for new remedies. Actions upon the case, being found most applicable to general purposes, were now resorted to more than any other.

Personal actions.

28 Hen. 6. 7. 15 Ed. 4. 19, et passim.

Oral pleading is supposed by some, as before mentioned, to have ceased as early as the reign of Edward III.; but

Oral pleading.

Ante, p. 282.

this appears to be altogether a matter of conjecture. Nor are we furnished with much better means of determining this question at the period we are now treating of. It is evident that the practice of committing legal proceedings to writing must have been gradually introduced, as it depended not only on the progress of the art of writing, but also on the form and order which was observed in conducting a suit. The writ, which was the first step in an action, was reduced to form, and, of course, to writing, at a very early period, as is clear from the specimens of different writs given by Glanville and Bracton. The declaration, the next important step in a suit, was not so quickly reduced to form, as the writs on which it was founded were not introduced all at the same time. We have the form of a declaration in a writ of right both in Glanville and Bracton, and the latter writer enlarges on all the parts of the declaration, in order to show the value of every word. That the declaration formed a part of the record as well as the plea, in the reign of Edward I., may be gathered from a complete record of the proceedings in an action of trespass from the writ to the award of the *venire*. In the reign of Edward III., the declarations were reduced to a settled form, suited to different actions, and were regularly committed to writing. As it appears, then, that all the proceedings in a suit, except the pleadings, were entered on the roll of the court, it was but another step for each party, after having had access to the roll, and examined the plea of his adversary, to reduce his own plea to a form, and put it on the roll. Mr. Reeves infers, from the frequent mention of the roll in the year-books of this and the preceding reign, that such was the practice then. Sir Matthew Hale judges, from the conciseness and inartificiality of the pleadings of those days, that the pleas were drawn at the bar; by which he seems to imply that the whole business of pleading was still conducted in the court, much after the former practice, and that pleadings were not then committed to paper as in his times. As pleading was an essential matter in the right conducting a

Ante, p. 110. 180.

Ante, p. 103. Bract. 372.

Ryley's Plac. Parl. 1, 2. 5.

Reeves' His. iv. 426.

Hale's Hist. c. 8.

cause, it had risen in the consideration of lawyers since the reign of Edward II. It is said, by the legal ornament of the age we are now treating of, "to be one of the most honourable, laudable, and profitable things in the law, to have the science of well pleading in actions real and personal."

Litt. Sect.

Some terms and forms, in regard to pleading, had come into use since the reign of Edward II., and others, then first mentioned or alluded to, were now become general.

Declaration. 6 Ed 4, et passim. Ante, p. 269. Bract 372.

The count was now distinguished by the modern name of declaration; but this was the only part of it in English. After the use of French was prohibited by the stat. 36 Ed. III. the declaration was put into Latin, and in the third person, as in the time of Bracton.

Imparlance. 3 Ed. 4. 51. Ante, p. 209.

Imparlance, which has already been explained, was now expressly named as an ordinary proceeding.

Aide prier.

Praying aid, is an old piece of law, mentioned by Bracton, and commonly known in this day by the name of *aide prier*. It is spoken of by that author in the case where the tenant, instead of vouching the king to warranty, which by law he could not do, prayed aid of the king in this form: "Sine rege respondere non potest, eo quod habet chartam suam de donatione, per quam si amitteret, rex ei teneretur ad excambium." In this day *aide prier* was a frequent proceeding between common persons. Thus, a tenant for life by the curtesy, and the like, might pray aid of him in reversion or remainder, to plead for him and defend the inheritance.

Bract. 382. 9 Hen. 6. 3. 35 Hen. 6. 6, et passim.

Colourable pleading. 40 Ed. 3. 23, 24. 19 Hen. 6. 21, et passim.

Colourable pleading, which is first mentioned in the reign of Edward III. was now become a regular proceeding in a suit. This was when the tenant, wishing to draw the question from the lay gents, that is, the jury to the court, admitted some colour of title in the plaintiff (not so good, indeed, as that by which the tenant claimed) and then prayed judgment of the court, whether the assize ought to inquire of a disseisin, where no disseisin could be committed by the tenant, who had the better title. This was called

Reeves' His. iii. 24. 441.

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giving colour; and although, for the most part, it was a fictitious proceeding, resorted to for purposes of delay, yet the courts were under the necessity of admitting it under certain restrictions. It appears, that without the aid of such a plea, the tenant might sometimes have been compelled to plead to the general issue to his disadvantage; for it became a rule of pleading at an early period, that no man was allowed to plead specially such a plea as amounted only to the general issue; but was in such case to plead the general issue in terms: thus, suppose the tenant's title was that he claimed by feoffment, with livery, from A., by force of which he entered, he could not plead this specially, because it amounted to no more than the general issue *nul tort, nul disse'sin*, which was to be inquired of by the assize; but he might plead this specially, provided he went on to say, that the plaintiff claimed by colour of a prior deed of feoffment without livery, and prayed the judgment of the court which of these two titles was the best.

Estoppel. Mayn. 620.

It is more than once mentioned in the year-book of Edward II. that a party was not received to plead, and in the subsequent reign, that he was estopped, that is, literally stopped, or hindered from pleading any plea that was forbidden; whence the term estoppel came into general use, in the reigns of Henry VI. and Edward IV. for an impediment or bar to a right of action, arising from a man's own act; as where a man is forbidden by law to speak against his own deed, for by his act or acceptance he may be estopped to allege or speak the truth.

Year-books. Hen. 6, and Ed. 4, passim. Co. Inst. 332.

Garnishment. Britt. c. 28. Mayn. 577. 1 Ed. 3. 12. 7 Hen. 6. 45, et passim.

Garnishment, which, from the French *garnir*, signifies literally warning or instruction, was employed at an early period to imply a warning or summons to a party to appear and give the court instruction on any matter; as where papers were deposited in the hands of a third party, he might, by the writ of *scire facias*, be summoned to show what had become of them. The party against whom the writ was issued was called the garnishee.

Interpleader.

Interpleader was another term in common use in those

days, for what, in point of practice, had existed at a much earlier period. This was properly the trial of a point that incidentally arose in the course of a suit, particularly in cases of garnishment. Thus, in an action of detinue, for deeds delivered by the plaintiff to the defendant to be redelivered, the defendant would plead that they were delivered to him by the plaintiff and one J. N., therefore he prayed garnishment against J. N. If, when the garnishee appeared, any question arose between him and the plaintiff, the defendant might then pray, that the two plaintiffs should interplead, that is, the one party become plaintiff, and the other defendant, for the trying that particular point.

Mayn. 84. Reeves' His. iii. 448. 3 Hen. 6. 20, et passim. Rast. Ent. 212.

Mise.

The issue in a writ of right was, in the reign of Edward III., if not before, called a *mise*, from *mettre*, to put; because the parties put themselves upon the mere right, that is to say, which had the greater right.

O.N.B. 2.

Argumentative pleading.

Among the rules of good pleading laid down in this day, we find one frequently mentioned against argumentative pleading, as it was afterwards termed, that is, against indirect pleas, which left the issue to be gathered by argument or inference. Thus, in trespass, *quare clausum fregit*, for entering the plaintiff's garden; the defendant was not permitted to say there was no garden, that being an indirect mode of denial, but he was to plead directly not guilty; so that every affirmative was to be answered by a direct negative. This direct sort of denial was distinguished, at an early period, by the peculiar name of traverse, and was frequently signified by the words *absque hoc* or *sans ceo que*.

Co. Inst. 303. Reeves' His. iii. 430. 6 Ed. 4, et passim.

Reeves' His. ii. 339. Mayn 386.

Negative pregnant.

Another indirect mode of pleading was distinguished in this day by the name of a negative pregnant, which was also a violation of the rule of good pleading. By a negative pregnant was understood such a denial as comprehended a certain admission, as where, in an action on the case against an innkeeper for goods lost by his default, the defendant pleaded they were not taken by his default, which was a kind of denial, pregnant with the admission that they might be taken though not by his default.

Reeves' His. iii. 431.

22 Hen. 6. 38. 39.

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Duplicity of pleading. Ante, p.209. Reeves' His. iii. 430.

Duplicity of pleading was now more unequivocally condemned than it had been before; but multiplicity of matter might sometimes be stated without incurring the charge of duplicity; thus, where the plea concluded with a *non est factum*, all the special reasons for the deed being void might be stated.

38 Hen. 6. 26, 27. *Protestation.* 9 Hen. 6. 26 and 59. 33 Hen. 6. 45.

So likewise, where a party might be concluded by force of his plea, he was at liberty to add a protestation, as it was now called; as if a lord pleaded *nil debet*, to debt brought by his villein, which plea would operate as an enfranchisement, by admitting him to be capable of having property, he was at liberty to plead that the plaintiff was his villein, and for plea to protest that he owed him nothing.

Departure in pleading. Reeves' His. iii. 437. Co. Inst. 303. 22 Hen. 6. 5.

Departure in pleading was another thing which we find prohibited, that is, when the second plea contained matter not pursuant to the former. It was held, that whatever was added in the subsequent plea should serve to fortify what went before, otherwise it was a bad plea; as if a defendant should first allege a title to the whole estate, and, in a subsequent plea, only to a moiety; the rejoinder was, in consequence, held to be bad.

Mayn. 506. Ibid. 589. Ibid. 354. Ibid. 542. Ibid. 545, et passim. Reeves' His. iii. 435. Long. 5. Ed. 4. 91. Rast. Disclaimer. 1 Ed. 4. 2. 9 Hen. 6. 14.

To this account of the state of pleading may be added a few of the pleas in different actions, most of which had, even as early as the reign of Edward II., been reduced to a set form, as in formedon the general plea was *ne dona pas;* against a deed, *nient le fait;* the plea of executors was, *pleinement administre;* in debt, *nil debet;* in detinue, *ne baila pas;* in a writ of annuity, *nient seisi;* in account, *ne unque receivour;* in an action of trespass, *non culpabilis.* So likewise, when a man claimed a seigniory, and distrained for the rent, the defendant might plead *hors de son fee;* a plaintiff in replevin might plead to the avowry, *non tenens de eodem,* &c. which was called a disclaimer, and was a plea in abatement; in all writs for the recovery of land, the tenant might plead *non tenuer, non est tenens eorundem tenementorum,* &c.; or he might plead joint-tenancy, that he was seised of the land as joint-tenant with A., and not

solely, &c. The management of these different pleas, so as to adapt them properly to the several cases brought forward called forth the skill of the pleader, and occasioned the principal discussion in the courts in those days.

Year-books.

One of the principal sources of legal information at this period were the year-books, which being more copious than those of the preceding reigns, furnish an account of all the points of law which were then discussed in the courts, and consequently have a greater interest for the modern lawyer as they contain an account of many particulars which form a part of our present jurisprudence. The first part of the reign of Henry VI. is considered by Lord Hale to be barren of solid learning, but the second part of Henry VI., and the whole of Edward IV., particularly the long quint, as it is called, has quite a different character.

Hale's Hist. Com. Law, c. 7.

The law treatises of this reign are those of Fortescue, of Littleton, and the abridgment of Statham.

Reeves' His. iv. 112.

Fortescue.

Sir John Fortescue, who had been for some time chief justice of the King's Bench, and also lord chancellor in the reign of Henry VI., was the author of several works of a political as well as a legal character, the principal of which was his treatise "De Laudibus Legum Angliæ," written for the benefit of the young prince Edward, during his exile in France, with the rest of the Lancastrian party. In this work he institutes a comparison between the civil and the common law, in order to show the excellence of the latter above the former. This treatise is said to have been first published by Edward Whitchurch, early in the reign of Henry VIII. in 16mo., but without date. In 1516 it was translated by Robert Mulcaster, and printed by R. Tottel, and again in 1567, 1579, and also by Thomas White in 1598, 1599, and 1609. Fortescue, with Hengham, was likewise printed in 1616 and 1660 in 12mo., and again with Selden's notes in 12mo. in 1672. An English translation with Mr. Selden's notes and the original Latin was published in 1775 in 8vo., to which was prefixed an historical preface by F. Gregor, Esq. Another translation with notes was

De Laudibus Legum Angliæ.

Bridgman's Leg. Bibliog.

published in 1825 in 8vo., by A. Amos, Esq., which has been consulted with advantage in the execution of this history. Sir John Fortescue was also the author of "Difference between an Absolute and Limited Monarchy, as it more particularly regards the English Constitution: to which is prefixed a Preface concerning the Laws of England, with Remarks, and an Index by the Editor, Fortescue Aland, Esq. first printed in 8vo. in 1714, and again in 1719."

Littleton's Tenures.

Sir Thomas Littleton, the most distinguished lawyer of his time, was a judge of the Common Pleas in the reign of Edward IV., and composed his book of tenures for the use of his son to whom it is addressed. It consists of three books, the first upon estates, the second upon tenures and services, and the third on the several incidents and consequences of tenures, as estates upon condition, descents, releases, confirmation, and the several matters respecting real property, on which he has already been referred to. This little treatise has acquired more notice, observes Mr. Reeves, than any other book on the law, partly on account of the nature of the subject, partly from the manner in which the subject is handled, but more particularly from the high character of the writer in his judicial capacity. The law of real property had undergone such changes as to render a methodical treatise on this subject desirable; and that of Littleton seems to have been precisely the thing that would supply this want. "It is not," adds Mr. Reeves "an accurate arrangement of his subject, not a remarkably apt division of his matter, not a strict adherence even to his own plan, in which points he is sometimes inferior to others of less note; but his excellence consists in the depth of his learning, the simplicity of his style, and the comprehensiveness of his thoughts."

Reeves' His. iv. 114.

Reeves, ubi supra.

The value of Littleton was felt so forcibly at the time, that it became a text-book for the student, from which he learnt, as it were, the institutes of English jurisprudence. Experienced lawyers canvassed and commented upon it with so much precision, that every section and sentence was

weighed, and all the consequences of every position were very minutely deduced. Nor was the value of this work less felt in after ages; for one who was himself one of the greatest ornaments of his profession raised the splendid superstructure of his own fame on a luminous commentary, which for amplitude and critical acumen, far surpasses any thing ever published on a book of science either before or since.

A work so valued might naturally be expected to be among the first to receive an extended circulation by the help of the new invention of the press. Accordingly we find, that Lettou and Machlinia, who were the servants and successors of Caxton, printed Littleton on Tenures in 1481, and, as is supposed, under the eye of the author himself; although Lord Coke supposes, that the first edition was printed in folio without date at Rouen, by W. le Tailleur for R. Pinson, a copy of which is in the Inner Temple library. In Herbert's edition of Ames mention is made of Littleton's Tenures, in French, printed by Pinson, in folio, in 1516, and another edition in small folio without date, besides others in 16mo. in 1525, 1526, 1528, all by the same printer. Another edition mentioned in Hargraves and Butler's notes to Coke's Littleton was printed by Machlinia in folio, and two others by Redman, in 1528, 1540. In the course of the next century, that is, from 1539 to 1630, not less than twenty-four editions all in French were published. The first edition in English is said to have been printed by Rastell, without date, and the next by W. Middleton, in 1528. In 1671 an edition in French and English was printed in 12mo. with double columns and a table of principal matters, since which time it has gone through numerous editions. The last and most important publication of this work with Coke's Commentary was begun by Mr. Hargrave, and finished by Mr. Butler, whose learned and useful notes, with the addition of Lord Hale's and Lord Chancellor Nottingham's annotations have rendered this the completest edition of any.

Ames' Typog. i. 112. Bridgman's Leg. Bibliog.

Ames' Typog. Antiq. i. 285.

Littleton composed this book when he was a judge, after the 14th year of the reign of king Edward IV., but the

Pref. to Inst.

exact time is not known. Lord Coke supposes it was not long before his death, because it wanted his last hand. From the 291st and 324th sections it may be gathered, that he intended to write on the tenancies of *elegit*, statute merchant, and statute staple, but he did not complete his design.

Littleton, who was descended of an ancient family De Littleton, was of the Inner Temple, and after having read learnedly upon the statute *De Donis Conditionalibus*, he was successively raised to the degree of serjeant, and steward of the court of the Marshalsea of the king's household and judge of Assize for the northern circuit, by Henry VI., which offices he held under Edward IV., until he was constituted one of the judges of the court of Common Pleas, after which he was honoured with the knighthood of the Bath. He married Joan one of the daughters and coheirs of William Burley of Broomscroft Castle in Shropshire, and died at a great and good old age, in the 21st year of Edward IV.

Statham's Abridgment.

Bridgman's Leg. Bibliog.

Statham's Abridgment of the Law, a kind of digest, is entitled to notice as the first attempt of this nature. It has been long superseded by similar and completer works. It contains the cases from the reign of Edward I. to the end of Henry VI., many of which are not to be found in the year-books of those reigns. It was printed in French and in 4to. without title, date, or author's name, bearing R. Pinson's mark. It is supposed to have been printed by W. le Tailleur at Rouen, the printer of Littleton's Tenures.

Lindewood's Provinciale.

To the abovementioned treatises on the common law may be added, that on ecclesiastical law by William Lindewood, official principal to Archbishop Chicheley. This work, entitled "Provinciale," contained the substance of almost every constitution, made in the synods of the province of Canterbury, from the time of Stephen Langton down to Archbishop Chicheley, to which he has added a very copious and minute comment, that serves to explain the proceedings of our ecclesiastical courts at that period. A copy of this work, bearing Caxton's mark and Wynken de Worde's

Reeves' His. iv. 118. Typog. Antiq. 98.

Colophon, is generally supposed to have been printed by the latter.

Inns of court.

Fort. de Laud. c. 49.

Of the number and state of the law societies at this period we are furnished with material information. The four principle societies, already mentioned under the reigns of Edward II. and III., were now called *hospitia curiæ*, the least of which is said to have contained two hundred students. Besides which there were ten, and sometimes more, smaller *hospitia*, called *hospitia cancellariæ*, inns of Chancery, each of which contained a hundred students and upwards. In these latter places, which were as seminaries to the former, the students, who were mostly young persons, were instructed in the elements of law, particularly as regarded original writs; from which latter circumstance they acquired the name of Inns of Chancery. Respecting the names and situations of some of these inns, something may be added to the account already given. Thavies or Tavies Inn and Clifford's Inn, mentioned in the reigns of Edward II. and III. were of the number. Clement's Inn, so called probably from its proximity to St. Clement's church, was an inn of Chancery in the reign of Henry IV. New Inn, not far from Clement's Inn, so called, as is supposed, because it was formed on the old foundation of St. George's Inn, was in all probability an inn of Chancery at this period, as Sir Thomas More was a student at this inn in the reign of Henry VII., from which he went to Lincoln's Inn. Barnard's Inn was at first called Motworth's Inn and belonged to the dean and chapter of Lincoln, as appears from a record in the reign of Henry VI. Furnival's Inn, which belonged to the Lords Furnival in the reign of Richard II., was an inn of Chancery in the subsequent reign; Staple Inn, so called because it was originally a staple hall for merchants, and Lion Inn, so called from the sign of the Black Lion, were inns of Chancery in the reign of Henry VI. The two others, to make up the number of ten, may possibly have been Strond Inn and St. George's Inn, although, as before observed, the

Inns of Chancery.

Ante, p. 216, 316.

10 Rep Pref. Dugd. Orig. 272. Hearne's Cur. Disc. 122. Hearne, 123. Dugd. 326.

Hearne, 124.

Dugd. 270.

Seld. Notes to Fort. c. 49.

CHAP. XXVII.

EDW. IV.

names of other inns are mentioned which existed probably before the reign of Edward III.

Serjeant's Inns.
Dugd. 326.
Seld. ubi supra.

Besides the abovementioned inns of court and Chancery, there were two Serjeant's Inns, so called because the judges and serjeants resided there. The Serjeant's Inn in Chancery-lane was inhabited by serjeants as early as the reign of Henry IV., when it was called Faryndon Inn. In the reign of Henry V. we find that the house was demised to the judges and apprentices of the law. In the 9th Henry VI. it obtained the name of *Hospitium Justitiariorum*, and in the 2d Richard III. there is a lease of it under the name of *Hospitium, vocatum Serjeant's Inn.* Serjeant's Inn in Fleet-street was inhabited by serjeants in the reign of Henry VI. There appears also to have been an inn called Scrope's Inn which was inhabited by serjeants in the reign of Richard III.

Study of the law.
Dugd. Orig. Jur.
Fort de Laud. Leg. Angl. c. 49.

As to the course pursued in these inns in the study of the law, we are not informed of any thing except that they had commenced the practice of reading on the statutes. It appears, however, that every branch of knowledge was taught in these seminaries. "Here," says a cotemporary writer, speaking of these inns, "every thing good is to be learnt, and all vice is banished." Besides, for the diversion of the students in their leisure hours, there was a gymnasium or academy attached to these inns, where they learnt singing, music, dancing, and such other accomplishments as were fitted for persons of their rank and station. For the nobility used to send their sons to these inns as they now do to the university, not so much to qualify them to practise the law, as to form their manners, and accustom them to good habits. The discipline in these places is said to have been so excellent as to prevent all differences and irregularities, and yet to have been effected solely by moral influence. The only punishment was expulsion, which, if it took place in one society, precluded the offender from admission into any other; wherefore, adds the abovementioned writer, it was dreaded more than imprisonment and chains are by criminals.

Fort. ubi supra.

The only distinction between the different members of these inns, of which any mention is made in that day, were that of serjeant and apprentice. Serjeant, in Latin *serviens*, was originally applied to military service; but a serjeant at law imports one who attends the service of the king and his people. All serjeants therefore are king's counsel, because they are called by the king's writ. The degree and estate of a serjeant was held to be highly honourable, and equivalent to the degree of a doctor in the civil and canon law. No one, however well versed he might be in the law, could be made a judge, either in the King's Bench or the Common Pleas, until he had been first called to be a serjeant, and he could not be advanced to this degree until he had been a student sixteen years. The coif was the serjeant's badge or mark of his being a graduate in the law, and such respect was paid to it that the serjeants were not obliged to take off their coif in the royal presence.

Serjeants. Barr. 222. 10 Rep. Pref.

Fort. c. 50.

The manner of conferring that degree was as follows: the lord chief justice, with the advice and consent of the judges, used to pitch upon seven or eight of the discreeter persons, such as had made the greatest proficiency in the law, whose names were handed in to the lord chancellor, upon which a writ was issued to each of them, commanding him to take upon him the state and degree of a serjeant at law. It seems that the command in the writ for the parties to appear was not a mere form, for they were not at liberty to decline the honour intended for them. A case of this kind occurred in the reign of Henry V., when, as we are informed, six grave and famous apprentices named John Martin, William Rabington, William Poles, William Westbury, John June and Thomas Rolfe, had writs delivered to them, which they sought all means to evade, and on the return thereof in Chancery made an absolute refusal. Upon this they were called before parliament, and being charged to take upon them the state and degree of serjeants, they at length complied.

Fort. ubi supra.

Rot. Parl. 5 Hen. 5. 2 Inst. 214. Reeves' His. iv. 122.

One reason perhaps for this refusal was the heavy expense,

Fort. ubi supra.

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which attended the call of serjeants at this time. Those who were so called held a sumptuous feast, as at a coronation, which continued for seven days together. Besides which, they made presents of gold rings to the value of forty pounds at least, and the whole expense amounted to upwards of 260 pounds for each person. At the same time we are informed that the profits of a serjeant's practice were such as to enable him to defray this expense. It is also worthy of note, that the practice of the law at this period was almost entirely confined to the younger branches of the nobility; so that there was scarcely a petitioner throughout the kingdom who was not a gentleman by birth or fortune. And as such persons were supposed, from their rank and education, to have a higher regard for their character than persons of lower degree, this elevated the profession of the law, and established those high principles of honour which have ever since formed the characteristics of the profession.

Apprentices.

The name of apprentice *en la ley* was given indiscriminately to all students, from the Fr. *apprendre*, to learn, signifying literally a learner or novitiate in the law; but those of the inns of court were distinguished by the epithet *nobiliores*, because they were admitted to plead, as appears from one of our chroniclers, who observes, in reference to the statute of Edward III., that "an ordinance and statute was made in 1363, that the serjeants and prentyses at law should plead their pleas in their mother tongue." It should seem that the term apprentice was also sometimes applied to serjeants in those days. It is said in the year-books of Henry VI., "Une apprentise vient en le Common Bank," &c.; and Fortescue expressly informs us, that none but serjeants were admitted to plead in the Common Pleas. Mr. Barrington is disposed to think, from the present ignoble application of the term apprentice as the learner of a trade, that it had not the same meaning in regard to the law, but was a corruption from *appris en la ley*; but no inference can be drawn from this circumstance, because many other words have experienced a similar fate, to sink in the dignity of their applica-

Dugd. Orig.

Fabian's Chron. 247. Dugd. Orig. 143.

2 Hen. 6. 5. Fort. de Laud. Leg. Ang. c. 50. Barringt. 311. Wynne's Eunom.

tion; as serjeant, a petty officer in the army, originally a gentleman or nobleman in the service of the king; constable, now one of the lowest civil officers, and originally one of the great officers of state. The term apprentice was first used in the law, at least the word does not occur in application to mechanic arts before the reign of Henry IV.; it is probable, therefore, that in consequence of this mean use of the word, apprentices at law began to be called barristers. At the period we are now treating of, they were sometimes named *apprenticii ad barras*.

Ante, p. 182.

Barr. ubi supra.

Attorney and solicitor general.

Probably the king's attorney was the only law officer of the crown until this reign. In the first year of this king we read of one Richard Fowler made solicitor to the king, and in the 11th year William Husee was appointed "attornatus generalis in Anglia cum potestate deputandi clericos et officiarios sub se in qualitercunque curia de recordo." This is the first mention of the attorney-general, who at that time was appointed for life.

Dugd. Chron. Ser. 67. 171.

Reeves' His. iv. 122.

Appointment and salaries, &c. of the judges.

The number of judges in this and the preceding reign was, in the court of Common Pleas, usually five or six at most, in the court of King's Bench four or five. When any one died, resigned, or was superseded, the king with the advice of his council, made choice of one of the serjeants at law, whom he constituted judge by his letters patent. Then the lord chancellor of England came into court with the letters patent, and introducing the serjeant, he notified to him the king's pleasure concerning his accession to the vacant office. The letters patent were then read in public, and the oath administered to him by the master of the rolls. When duly sworn the chancellor gave into his hands the letters patent, and the lord chief justice of the court assigned him his place where he was to sit. Most of the judges had the honour of knighthood, some of them being knights banneret, and some knights of the Bath. They made no entertainments, nor were at any extraordinary expense at their accession to office, but their dress was different from that of the serjeants in some respects, the cloak being sub-

Fort. de Laud. c. 51.

Dugd. Orig. 103.

Fort. ubi supra.

stituted for the hood of the serjeant, and the cap furred with minever instead of white lamb's wool.

The duty of the judges was not severe, for they did not sit in the king's courts above three hours in the day, that is, from eight in the morning until eleven; but, on the other hand, their salaries were small, and inadequate to support the dignity of their station, wherefore, in the 18th year of King Henry VI., the judges of all the courts at Westminster, together with the king's attorney and serjeants, exhibited a petition in parliament on this subject; in consequence an order was taken for increasing their salaries, and an allowance for robes. In the 1st Ed. IV. Markham the chief justice had 170 marks for annual pension, *5l.* 6*s.* 6*d.* for his winter robes, and the same for his Whitsuntide robes, *juxta formam cujusdem actus in Parliamento* 18 Henry VI.

Dugd. Orig. 109.

CHAPTER XXVIII.

RICHARD III.—HENRY VII.

Statutes of Richard III.—Statute of Uses.—Fines and Nonclaim.—Bailing Offenders.—Feoffees to Uses.—Benevolences.—Use of the English Language.—Public and Private Acts.—State of the Laws under Henry VII.—Statutes of Liveries.—Protection of the King's Friends.—English Law in Ireland.—Poyning's Act.—Vagrancy.—Bye-Laws.—Statute of Fines.—Statute of Uses.—Alienation of Dower.—Alienation of Tenant in Tail.—Fraudulent Gifts.—Administration of Justice.—Court of Star Chamber.—Informations at the Assizes and Sessions.—Popular Actions.—Suing in Forma Pauperis.—Writs of Error.—Sheriffs.—Attaints.—Bailing Offenders.—Justices of the Peace.—Coinage.—New Felonies.—Stealing Women.—Hunting in Disguise.—Game Laws.—Usury.—Benefit of Clergy.—Decisions of Courts.—Uses.—Bargain and Sale.—Covenant to stand seized to a Use.—Jointures.—Ejectment.—Larceny.—Rescue.—Challenges.—Sanctuary.—Year Book.—Justice of the Peace.—Printing Law Books.

CHAP. XXVIII. Ric. III.

THE short reign of the unfortunate prince Edward V. afforded no opportunity for calling a parliament, although the business of the courts went on without interruption, in the midst of the revolutions which succeeded each other so rapidly. The reign of Richard III., though short, was not altogether barren of materials for the legal historian. Richard called a parliament in the first year of his reign, in which several acts were passed.

Statutes of Richard III.

The principal subjects of these statutes were uses, fines, and bailing offenders, on which some wise provisions were made by this king, who seemed to wish to atone for his atrocious usurpation by the wisdom of his government.

Statute of Uses. 1 Ric. 3.

CHAP. XXVIII. Ric. III.

His first act was passed with the view of obviating some of the numerous inconveniences which were then found to attend the conveying of land to a use. By the common law, *custui que use* had no power to aliene the land, or do any act to charge the freehold without the concurrence of the feoffee, which often created much embarrassment and confusion in the conveying of lands, wherefore power was given by the statute to the *cestui que use* to dispose of the estate in the same manner as the feoffee to the use might do at common law.

Fines and Nonclaim. Stat. 1 Ric. 3. 7.

The evils which the statute of Nonclaim in the reign of Ed. III. had occasioned, by diminishing the validity of fines, had doubtless long been felt; but it was left to the usurper Richard III. to remedy these evils by restoring the old law. Every fine, after engrossing, was to be openly and solemnly read and proclaimed in court, the same term and three next terms, during which ceremony all pleas should cease. A transcript was then to be sent from the justices to the justices of the assize where the lands lay, who were, in like manner, to cause it to be proclaimed in every one of their sessions; and the justices of the peace the same in their sessions; which proclamations were to be certified the second return of the following term. After this, a fine was to exclude all parties, as well privies as strangers, except *femmes covert* not consenting hereto, persons within age, in prison, out of the realm, or not of whole memory, all others having a title at the time the fine was levied were to put in their claim within five years after the proclamation and certificate.

Bailing Offenders.

Notwithstanding the provisions in Magna Charta and stat. West. 1, for securing the personal liberty of the subject, and preventing unlawful imprisonments, persons were nevertheless subject to be daily arrested and imprisoned for felony, either on no ground at all or on very slight suspicions, and were kept without bail and mainprise; wherefore, the power of bailing offenders was given to the justices of the peace, who were to inquire at their sessions of the escapes

of all persons arrested and imprisoned. Sheriffs, and other officers, were likewise prohibited from seizing the goods of those who were arrested or imprisoned for felonies, before conviction or attainder, upon pain of forfeiting to the person aggrieved double the value of the things so taken.

Feoffees to Uses. Stat. 1 Ric. 3. c. 5.

As this king had, while Duke of Gloucester, been made feoffee to uses, and might, when he came to the throne, have been entitled to hold the land discharged of the use, it was ordained, that wherever the king was co-feoffee of lands to the use of the feoffor, the right should be in the co-feoffees.

Benevolences. Stat. 1 Ric. 3. c. 2.

Moreover, to ingratiate himself with the people, he did away with benevolences, an unparliamentary mode of taxation, which had been resorted to in the preceding reign.

Use of the English language.

It was probably with the same politic design, that he caused all the statutes of this reign to be penned in English, which henceforth became the only language employed in the statutes. After the introduction of English into our courts of law, its use became gradually more general. In the reign of Richard II., we find it used in a formal proceeding in parliament, on the occasion of the Earl of Arundel asking pardon of the Duke of Lancaster. Henry IV. also claimed the crown in the same language. In Henry the Fifth's time, a mixture of French, English, and also Latin, occurs in the same page in the rolls of Parliament. One of the earliest English petitions is, that by the Italian merchants, in the 2 Hen. VI. In the statutes of Edward IV. there appears to be no English, which makes the entire adoption of the English in the statutes of Richard III. the more remarkable, and seems to prove that this was not accidental.

Luder on the French language, 70.

Private and public acts.

A distinction also now sprung up between private and public acts, which is entitled to notice in tracing the progress of parliament. Before the reign of Edward IV. the Commons had not been used to be consulted on judgments of life and death; but that prince thought proper, as before observed, to obtain their sanction to the sentence which had been passed by the Peers on his brother, the Duke of Clarence, on a charge of high treason. This gave rise to

Parl. Hist. ii. 373.

parliamentary attainders, of which Richard III. and his successors, had occasion to make ample use. Henceforth, likewise, many other matters affecting private interests were laid before the whole parliament, and the bills passed thereon were distinguished by the name of private acts.

State of the laws under Henry VII.

Parl. Hist. ii. 419.

Henry VII. is commended by his historian, Lord Bacon, for the wisdom of his laws and the vigilance of his administration. At the close of his first parliament, he framed an oath to be taken, not only by those of his own household, but also by the houses of Lords and Commons, binding them to observe the execution of the statutes. A remarkable instance is cited of this king's solicitude for the observance of the laws. At an entertainment given him by the Earl of Oxford, he expressed great surprise and displeasure at seeing so great a number of servants in livery; adding, that he must not see the laws broken before his face, and that his attorney must speak with him. The earl is said to have paid 15,000 marks by way of composition for this offence.

Reeves' His. iv. 183.

Statutes of Liveries.

Stat. 3 Hen. 7. c. 12.

Stat. 19 Hen. 7. c. 14.

He not only thus put in force the former statutes of Liveries, but added two others, with the view of diminishing the influence and strength of the nobility. At the same time he took care to provide a suitable retinue for his own person. All who stood in any relation whatever to the king, whether by tenure or otherwise, were required (unless they had the king's licence to excuse them, or were prevented by infirmity) to attend him in person when he went to war, on pain of forfeiting whatever they held by the grant of the crown. This did not extend to spiritual persons, nor such as were engaged in the administration of justice.

Attendance on the king.

Stat. 7 Hen. 7. c. 2, 3. 11 Hen. 7. c. 18.

Protection of the king's friends.

As Henry's title was at first insecure, in consequence of the landing of Perkin Warbeck, a singular provision was made in parliament, in favour of the king's adherents, the object of which was to afford them some security in the event of a revolution. It was therefore ordained, that no person who, in arms or otherwise, assists the king for the time being, should afterwards be convicted or attainted thereof as of an offence by course of law or by act of parliament.

Stat. 2 Hen. 7. c. 1.

English law in Ireland.

It has already been shown that the introduction of English law in Ireland was, at an early period, an object of consideration with our kings, in consequence of which the common law became gradually established and extended; and as many of the English statutes, as then existed, were, by means of the king's writs, made binding in that country. But after the formation of the Irish parliament, it became the general opinion that the Irish were not bound by any English statutes, and as that doctrine tended to produce a separation where a union was so desirable, an act was passed in the tenth year of this king, by the first chapter of which it was ordained, that all acts of parliament made in England should be in force within the realm of Ireland. Moreover, in order to render the jurisprudence of both countries as similar as possible, it was provided by another chapter, that before a parliament was summoned or holden, the chief governor of Ireland should certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts to be proposed therein. That after the king in council should have considered, approved, and altered the said acts, and certified them back under the great seal of England, and given licence to summon and hold a parliament, then the same might be summoned and the acts so certified, and none others, might be proposed, for their acceptance or rejection. Before this act, the chief governor used to hold parliaments either annually or at pleasure, which enacted such laws as they thought proper.

20 Hen. 6. 8. 2 Ric. 3. 12.

Poyning's Act. 10 Hen. 7.

Irish Stat. 11 Eliz. st. 3. c. 8.

In order to keep the administration of justice in Ireland conformable with that in the parent state, an appeal was given from the King's Bench in Ireland to the King's Bench in England.

Div. of Courts, 5.

Vagrancy.

The laws against vagrants and idle persons were now confirmed and enforced so as to render them more effective. Vagabonds were to be set in the stocks for three days and three nights, and kept upon bread and water. All persons were prohibited from giving any alms, on pain of being fined a shilling; and all poor persons not able to work were required

Stat. 11 Hen. 7. c. 12.

Stat. 19 Hen. 7. c. 12.

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Stat. 11, 4 Hen. 7.

to repair to the next hundred, where they were born or best known, and there remain, under the penalty of being dealt with as vagrants, if they were found elsewhere. Many other laws of a similar nature were made for the regulation of wages, apprenticing the children of artificers, and the like, which paved the way for further improvements in subsequent reigns.

Bye-laws. Stat. 19 Hen. 7. c. 7.

In order to restrict corporations in their liberty of making bye-laws, all the acts and ordinances of such bodies were to be approved by the chancellor, treasurer, or justices of either bench, or otherwise they should be void.

Statute of Fines. Stat. 4 Hen. 7.

The two most important acts of this reign affecting real property were the statute of Fines and the statute of Uses. The statute of fines was only a confirmation and enlargement of that in the preceding reign above mentioned; with such additions as paved the way for further changes in the law in subsequent reigns. As by one of the provisions of this statute fines of land, levied with proclamation, were to conclude as well privies as strangers, this was supposed to have a tendency to give to fines the efficacy of barring an entail, but it was not so interpreted until some time after. The immediate object of this statute was, like that before-mentioned, to do away the evils of nonclaim, and to restore the law of fines to its original state.

Reeves' His. iv. 135.

Statutes of Uses. Stat. 1 Hen. 7. Reeves' His. iv. 139. Bro. Pernor des Prof. 14.

All the parliamentary provisions of this day, on the subject of uses, had for their object to make the *cestui que use* to be considered as the real owner of the estate. One statute, in the first year of this king, ordained that *cestui que use* should answer to a formedon; and the suit be conducted against him as if he held the land. Another statute enabled the lord to establish his right to wardship and relief against *cestui que use*. A third statute made the lands, tenements, and hereditaments of *cestui que use* to be liable to the creditors of *cestui que use*.

Stat. 4 Hen. 7. c. 17.

Alienation of dower. Stat. 11 Hen. 7. c. 20.

The alienation of dower, on the part of widows, was prevented by a statute in the 11th year of this king, which empowered the person next entitled after the woman's death

to enter immediately and enjoy the land in case of any such alienation, in the same manner as if the woman were actually dead.

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It appears from Littleton, that before this reign, tenant in tail might work a discontinuance by enfeoffment and the like; wherefore, to prevent this in regard to a woman tenant in tail, a statute in the 11th year of this king made all such discontinuances void. If a woman tenant in tail after this aliened with warranty, such a discontinuance did not take away the entry, after her death, either of the issue or of him in reversion or remainder.

Alienations of tenant in tail. Litt. s. 595. Co. Inst. 326.

The practice of persons making fraudulent gifts of their effects, and then flying to sanctuary to elude their creditors, was put a stop to by a statute in the 3d year of this king, which made all such deeds of gift void.

Fraudulent gifts.

The administration of justice was, as before observed, a matter of great concern with this king; but as he was a lover of money as well as of justice, he is said to have made the latter subservient to the former, and in some cases so as to render his government unpopular. He strictly enforced all penal statutes which served to replenish his coffers, and for the same reason, is said to have caused prosecutions to be instituted on many old and forgotten laws.

Administration of justice. Reeves' His. iv. 184.

The new modelling of the judicature in council, and establishing the court familiarly called the court of the Star Chamber, was one of the measures by which this king effected his purpose of enforcing the penal statutes. The criminal jurisdiction of the king's council had, in consequence of the distribution of the judicial power among the several courts, been much circumscribed; and, owing to the jealousy which it had occasioned, it had from time to time been curtailed by parliamentary provisions. But notwithstanding these restrictions, it still retained some portion of its pristine authority, and was employed in inquiring into offences the enormity of which made them unfit for the cognizance of the common-law courts. The statute, therefore, in the third year of this king, did not, as some have imagined,

Court of the Star Chamber. Lamb. Archaion, 167. Co. 4 Inst. Bacon's Life of Henry 7. 63. Stat. 3 Hen. 7. c. 1. 13.

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erect a new court, but only brought it nearer to the original judicature of the council. The preamble to the act states, that "the king remembered how, by unlawful maintenances, giving of liveries, signs, and tokens, and retainers by indentures, promises, oaths, writings, or otherwise, embraceries of his subjects, untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money by juries, by great riots, and unlawful assemblies, the policy and good rule of this realm is almost subdued; and for the not punishing of these inconveniences, and by occasion of the premises, little or nothing may be found by inquiry," (that is by the inquest of jurors) "whereby the laws of the land in execution may take little effect, to the increase of murders, robberies, perjuries, and unsureties of all men living; and for the reformation of all which it was now declared, that the chancellor, treasurer, and privy seal, or two of them, calling to them a bishop and a temporal lord, &c. had authority to call before them, by writ or privy seal, the offenders and others, as it shall think fit, by whom the truth may be known; and to examine and punish in like manner, as they ought to be punished, if they were convict after the due order of the law."

Reeves' His. iv. 147.

Lamb. Arch. ubi supra.

Before this statute, the king and council did not admit of any complaint which did not carry with it, in the words of Lambard, a reasonable surmise of maintenance of their jurisdiction, for proof of which the complainant was, by stat. 15 Hen. VI. c. 4. to give sureties; but now, by this act, three only of the council were empowered to hear and determine the offences above mentioned, without any manner of surmise or suggestion. By a subsequent statute, the president of the council was added to the three persons before mentioned; and it was moreover explained, that the bishop and others who might be called in were only to give advice, without having any authority.

Lamb. Arch. 168, et seq.

The only change introduced by this statute regarded the process, which was more summary than that by indictment or action. The punishments to be inflicted, and the offences

of which this court took cognizance, were to remain, as they had been before, at common law.

But the power with which this court was armed to punish offenders was, notwithstanding this limitation, always looked upon as unmeasurable, particularly as it might be exercised at the discretion of the government, without the possibility of appeal. As it was peculiarly a court of the king, Henry and his successors frequently set there in person.

Lamb. ubi supra.

This court derived its name from the chamber where it sat, which is supposed to have been so called from the roof, which was painted with stars; but Mr. Justice Blackstone derives it from the word *starrum*, in the Hebrew *shetar*, a covenant; because in this chamber probably the contracts and obligations of the Jews were deposited before their banishment. Be this as it may, it is certain that, in the reign of Edward III., this chamber was distinguished by the appellation *la chambre des etoiles*.

4 Co. Inst. 14.
4 Comm.

Informations at the assizes and sessions.

The practice of commencing prosecutions by bill or information, as it was now regularly called in the courts of Exchequer and King's Bench, had probably been on the increase since the reign of Edward III., where it is first mentioned. It was now still further extended, by a statute in the 11th year of this king, which empowered justices of assize and justices of the peace, upon information, to hear and determine, without jury, all offences except treason, murder, or felony, committed against any statute not repealed. This statute, which, by its operation, tended much to increase the number of forfeitures, was far too unpopular to be lasting, and was accordingly repealed in the next reign. It is said, that by colour of this act, Empson and Dudley, who were made masters of the king's forfeitures, availed themselves of their new office to commit enormous exactions.

Ante, p.283.
Stat. 4 Hen. 7. c. 3.

Popular actions.

Another statute, in the 4th year of this king, had equally a view to the emoluments of the Exchequer. This was on the subject of popular actions, which, in order to evade the forfeitures rigorously imposed by government, were some-

4 Hen. 7. c. 24.

times collusively brought by friends, and judgment suffered to go by default; so that, if an adverse plaintiff brought a suit, they might plead this judgment in bar of another action. To defeat the design of this practice, the statute gave the plaintiff permission to plead covin, in reply, and to have judgment in execution as if no other action had been brought; and where the collusion was proved, the defendant was to suffer imprisonment.

Suing in forma pauperis.
Stat. 11 Hen. 7. c. 12.

The allowing of persons to sue *in forma pauperis* was one of those humane regulations which bear out the character of this prince as a lover of justice. By a statute in the 11th year of this king, it was ordained, that every poor person should have original writs, and writs of subpœna, without paying for the sealing or writing thereof; and the chancellor was to assign clerks, counsel and attornies, for that purpose. If the writs were returnable before any of the justices of any court of record, they were also to assign counsel and attornies to act without fee. This indulgence was obviously liable to abuse, and therefore called for the interference of the legislature in a subsequent reign.

Writs of error.
Ante, p.184.
Stat. 3 Hen. 7. c. 10.

The liberty of bringing writs of error was, as before observed, greatly enlarged by a statute in the reign of Edward III.; but as this was often resorted to for the purposes of delay, the party bringing the writ was, if unsuccessful, now made liable to pay costs and damages to the other party for the delay and wrongful vexation.

Appeal of homicide.
Reeves' His. iii. 129.

The inefficacy of appeals, as a mode of bringing offenders to justice, has been felt at all times; insomuch, that when indictments came into use, it was a common thing, in the reign of Edward III., for an indictment and an appeal to be depending for the same fact; and the appellee would sometimes, on default of the appellor, be arraigned at the suit of the king. But the appeal being the older practice of the two, and that which served most to gratify private resentments, it was most usual for the indictment not to be brought until after the expiration of the year and day, the time limited for bringing, which was attended with such inconve-

47 Ed. 3. 16.

nience as to call for legislative interference. Accordingly, we find it stated, in an act passed for this purpose, that "whereas by the common law, the king's suit, in case of homicide, did expect the year and day allowed to the partie's suit, by way of appeal; and that it was found by experience that the partie was many times compounded with, and many times wearied with the suit, so that in the end such suit was let fall, and by that time in a manner forgotten, and thereby prosecution at the king's suit by indictment (which is ever best *flagrante crimine*) neglected, it was ordained, that the suit by indictment might be taken at any time within the year and day as after, not prejudicing nevertheless the parties' suit." This power of trying an offender a second time for the same offence was confined to cases where the party accused had not had his clergy.

Bacon's Life of Hen. 7. 66.

Sheriffs.

Although the conduct of sheriffs and jurors had engaged the attention of the legislature in almost every preceding reign, yet fresh legislative provisions were now found necessary. Under-sheriffs, and their clerks, were now guilty of the practice of entering plaints without the consent of plaintiffs, and even where there was no plaintiff, after which they omitted to attach and summon the defendant, and then made great levies upon him for his default. To remedy this evil, a statute, in the 11th of this king, required, that no plaintiff was to be entered in the sheriff's court without pledges being found; and not more than one plaint for one trespass or debt be entered, under a penalty of 40*s*. to be imposed upon the sheriff.

Stat. 11 Hen. 7. c. 15.

Attaints.

The object of attaints was, doubtless, to render the trial by jury as incorrupt and as complete as possible; but this object was defeated by the delay which attended the prosecution of such a suit. Besides, the severity of the punishment on conviction induced many to suffer injury from a false verdict rather than be the cause of inflicting the villeinous judgment on jurors. For this reason it was thought better to substitute a pecuniary penalty in lieu of the ancient common-law punishment.

Stat. 11 Hen. 7. c. 24.

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Stat. 3 Hen. 7. c. 1.

That jurors might be kept strictly to the regular making of presentments, justices of the peace were empowered, by statute, to take, at their discretion, an inquest, to inquire into the concealment of other inquests, and to punish every one of such inquest for the concealment.

Capias and outlawry. Stat. 19 Hen. 7. c. 9.

As actions on the case were now become so general, the process by *capias* and outlawry was made the same as in trespass and debt, so as to be attended with less delay than the old common-law process of attachment and distress. This regulation was, however, at present confined to the courts of King's Bench and Common Pleas.

Bailing offenders. Ante, p.422. Stat. 3 Hen. 7. c. 3.

The facility afforded for the bailing of offenders by the statute in the preceding reign, having been found liable to abuse, it was now ordained that not less than two justices, at least, were to have such authority.

Justices of the peace. Stat. 4 Hen. 7. c. 12.

As a protection against the abuse of magisterial authority, a proclamation was appointed, by statute, to be read four times a year, at the sessions, exhorting all persons who had cause of complaint against any justice to state their grievance to any of his fellow justices in the neighbourhood; and, if he gave him no redress, then to the justices of assize; and, lastly, if needful, to the king or his chancellor.

Coinage. Stat. 4 Hen. 7. c. 18. Stat. 19 Hen. 7. c. 5.

The law of treason was extended, by statute, to the counterfeiting the coin of any foreign realm permitted to be current here. Besides, the circulation of clipped and base coin, as also the exportation of bullion to Ireland, and the importation of gold and silver coin from that country, were made punishable with imprisonment.

New felonies. Stat. 3 Hen. 7. c. 14.

Stealing women. Stat. 3 Hen. 7. c. 2.

Hunting in disguise.

A statute, in the 3d year of this king, made it felony for any servant of the king, being enrolled in the cheque-roll, to compass or imagine the death of the king, or of any lord, or privy councillor, steward, treasurer, and comptroller of the household. The forcible abduction of any woman against her consent, whether maid, wife, or widow, having a substance in lands or goods, being an heir apparent, was also made felony. But she must be married or deflowered to make the taking an offence under this act. Hunting in

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parks with visors and painted faces, was another new felony created by statute; provided the offender willingly concealed himself after the warrant was issued for his apprehension. This was the first act which made unlawful hunting, or poaching, as it has since been called, felony; and therefore, observes Lord Coke, as it was at variance with that clause in *Carta de Foresta*, which ordained, that no man should suffer in life or limb for offences against the forest, it was equitably constructed by the judges.

Stat. 1 Hen. 7. c. 7.

Co. 2 Inst.

Game laws.

Other accessions were made to the game laws in this reign, in favour, not only of hawks, but also of pheasants and partridges. The taking of hawks, or driving them out of their coverts, or doing them any harm, subjected the offender to a penalty of 10*l.*; and the taking their eggs was punished with imprisonment for a year and a day. A similar provision was made against taking swans, herons, pheasants and partridges, by means of nets or engines, without the special licence of the owner. Half the penalty to go to him that sued, and half to the owner of the ground where they were taken.

Usury.

Stat. 11. and 3 Hen. 7.

The common-law offence of usury was now made penal by statute. Persons lending money, or bargaining for lands or goods on usury, were to forfeit half the value. Brokers of such bargains were to be set in the pillory, imprisoned half a year, and fined 20*l.*

Benefit of clergy.

Benefit of clergy was now modelled by the legislature so as to make it serve the purpose of distinguishing offences rather than persons. This privilege was at first intended only for such as were actual clergy; but as the circumstance of being enabled to read was made the evidence of one being a clergyman, this naturally extended the privilege to many of the laity. The statute *De Clero*, 25 Ed. III., aimed at doing away this abuse, which was, however, too deep-rooted, and too much in unison with the feelings and opinions of the age, to be thus abolished. The legislature, therefore, acting on the prudent and cautious principle which appears, for the most part, to have guided the modellers and framers

of our laws in former times, did not attempt to introduce any violent change by the total abolition of the privilege; but made it subservient to the ends of justice by restricting it to a certain description of offenders. Laymen were allowed their clergy only once; and every person so convicted, if it was for murder, was to be marked with an M.; and if for any other felony, with a T. Actual clerks were, upon their second trial, if not provided with their letters of order, nor a certificate thereof from the ordinary, to be dealt with as those not in orders. Soldiers departing out of the the king's service, without licence of their captain, were to be deemed felons, without benefit of clergy. Those convicted of petty treason were, in like manner, excluded from the benefit of clergy.

Stat. 4 Hen. 7. c. 13.

Stat. 7 Hen. 7. c. 1.

Stat. 12 Hen. 7. c. 7.

Decisions of courts.

Questions of law were discussed in the courts with the same precision as in the two former reigns; but the year-books do not furnish much that is entitled to notice in the history.

Uses.

Reeves' His. iv. 162.

In consequence of the statute of Uses, the learning on that subject ran into much nicety and refinement; but the courts appear to have adhered very strictly to the letter of the statute of Richard III. in regard to the rights of *cestui que use*. Among the conveyances to a use, that by Bargain and Sale is mentioned at this period. This was effected in two ways, either that *cestui que use* sold to another the use, and the feoffee from that time stood seised to the use of the vendee; or the bargainor, being actually seised of the freehold, sold the land to the vendee, in which case he stood seised to the use so sold. Although this was transacted without the formality of a deed, yet it was held good in the courts by virtue of the statute, and thus superseded the common-law conveyance by feoffment and livery of seisin. The validity of this conveyance, which depended on the contract, necessarily supposed that it had been made upon some valuable consideration.

Bargain and sale.

21 Hen. 7. 6. Bacon's Tracts, 317.

Covenant to stand seised to a use.

Another mode of conveying uses was by covenant to stand seised to a use, which, although not admitted at this time

into our common-law courts, is supposed to have been frequent in Chancery, judging from the numerous precedents extant in this reign, of covenants of marriage, for which purposes uses were then commonly conveyed by way of settlement of some part of the estate for the benefit of the widow and the issue. In these cases, it was usual to raise an estate for life to the husband and wife jointly, which joint estate, now called a jointure, was intended as a maintenance for the wife, if she survived, in lieu of her dower, of which she was deprived when a husband's estate was in use and not in seisin.

21 Hen. 7. 18, 19. Mad. Form. Angl passim. Reeves' His. iv. 163, 164.

Jointures.

The decisions of the courts in this reign, in regard to the effect of the writ of *ejectione firmæ*, or the action of ejectment, lead to an important change in real remedies. In the reign of Edward III., it was held that an *ejectione firmæ* was an action of trespass, in which the plaintiff could only recover damages for the trespass; and that, for the recovery of his term, he must bring a writ of covenant. In the reign of Edward IV., it appears that the courts inclined to the opinion, that in *ejectione firmæ* the plaintiff might recover what remained unexpired of his term, and also damages for the time it was held from him. This opinion was now confirmed by the solemn decision of the court, in the 14th year of this king, when the recovery of the term, as well as damages, were adjudged to the plaintiff in an action of ejectment. This decision gave to the writ of *ejectione firmæ* new power, by which it might be employed as a means of trying titles to land, and paved the way for its being made the substitute for real actions, as writs of assize, of novel disseisin, writs of entry and writs of right, which gradually went out of use. As to the manner of proceeding in this action, more will be said hereafter. Suffice it now to observe, that the commencement of this practice is commonly dated from this reign, although it was not regularly introduced until some time after. The remedies by real action still continued, and titles to real property were also debated in trespass and replevin.

Ejectment.

Ante, p.278.

7 Ed. 4. 6.

14 Hen. 7. 241.

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Larceny.

Reeves' His. iv. 178. 3 Hen. 7. 12.

The subject of larceny was again agitated in this reign, it being a matter of doubt whether, if a shepherd took the sheep, or a butler the plate under his care, it was felony. Hussey, who was then chief justice, thought it was, and related the case of a butler who was hanged under similar circumstances; and this was confirmed by Haugh, who related a similar case of a goldsmith, who had taken something intrusted to his charge. On the other hand, Bryan argued, that it could not be felony, because neither of these persons could be said to take these things *vi et armis*, while he had them under his care; and of this opinion were the other justices, so that this point of law remained doubtful, and was not decided for some time afterwards.

Rescue.

Ante, p. 37. 1 Hen. 7. 6.

Rescuing a felon out of the officer's hands as he was leading to execution was held to be felony, and the offender a principal and not an accessory, which was agreeable to the old Saxon law.

Principal and accessory.

3 Hen. 7. 1.

The law of principal and accessory continued unsettled in this reign. Where the principal and accessory were both arraigned and found guilty, and the principal demanded a book, all the justices and serjeants came to the decision, that the accessory should be dismissed; to which the reporter adds, that when the principal confessed the fact and demanded a book, accessory should not be arraigned, because no judgment was passed against the principal; but, notwithstanding this decision, it should seem that the common course was to arraign the accessory, and if found guilty he was hanged. A distinction was, however, now made between an accessory before the fact, and an accessory after the fact; the former, if he fled, lost his goods the same as the principal though acquitted, but the latter did not suffer such a loss.

4 Hen. 7. 18. 110.

Challenges.

3 Hen. 7. 2. Ibid. 12.

Prisoners who challenged more than thirty-six jurors were, in the reign of Henry IV., put to their penance; but it was now decided that a man, both in an appeal and an indictment, should be hanged and not put to his penance, and that this should henceforth be the practice in their

circuits, notwithstanding the contrary usage in former reigns.

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Sanctuary. 1 Hen. 7. 24.

The law of sanctuary was restricted in cases of high treason, that this privilege could not be claimed by prescription without an original charter before the time of memory, because it so materially concerned the kings prerogative.

It cannot fail to strike the reader, on taking a review of the state of the law in the reigns of Henry VI. and his successors Edward IV. and Henry VII., that what it had gained in precision, it had lost in certainty and stability. Those to whom the administration of the law was intrusted, were themselves debating what the law was, not merely in new and untried cases, which might reasonably admit of a doubt; but in matters which had heretofore been established. Thus law was in many essential points without rule or order, and reduced to matter of private opinion. We find in many instances, as in larceny, principal and accessory, and others, the maxims of former times were dispensed with or violated, and as a natural consequence, the decisions of one reign were opposed to those of another, and the practice of the courts opposed to the united opinions of the judges.

Year-book. Reeves' His. iv. 185.

The year-book of this reign which goes very fully into all the points of law above mentioned, will no doubt have, as Mr. Reeves observes, a greater interest for the modern reader, as it touches on many particulars which are law in the present day. Besides the reports in this book, there are some cases of this reign to be found in Jenkins, Benloe, and Keilway, particularly the latter.

Justice of the peace. Reeves' His. iv. 186. Callis' Reading on Sewers.

The only treatise of this reign by Marrow is said to be still in MS. It was written on the office of justice of the peace, and is quoted by Fitzherbert and Lambard in terms of commendation.

Printing law-books. Ames' Typog. Antiq.

The art of printing was now beginning to be employed on law works very generally. At the period we are now treating of there were several persons who were engaged in the printing business, and succeeded Caxton and other printers before mentioned. The names of these best known are,

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Wynken de Worde who took the lead, Pynson and Julian Notary, who both competed with him in 1497 and 1498, William Faques in 1504, and afterwards Henry Pepwell, who all appear to have filled the office of king's printer; but this appointment is supposed to have been by sign manual and not by patent, and not to have given any exclusive right of printing law-books. The statutes passed in this reign were printed by Wynken de Worde, Pynson, and Faques, and some were frequently reprinted by all of them. A collection under the title of "Nova Statuta," beginning with the 1st Edward III., and ending with 12th Henry VII., was printed by Pynson, and, as is supposed, in the year 1497. The year-book of Henry VI. was, as before observed, in all probability printed as early as 1480; but whether any year-book was printed in this reign was not known. It has been said, that Wynken de Worde was the first who began to print the year-books, and that he and Pynson printed above forty of them, which were to be found among the *libri manuscripti*; but upon search being made, none such were found. Moreover, Mr. Ames informs us, that he never met with any year-book bearing the name of Wynken de Worde, but that he had seen two bearing 17th and 18th of Edward III. without a printer's name and date, which he thought were printed with the same type as Fitzherbert's abridgment, and he makes no question were printed by Wynken de Worde in the subsequent reign. It is well known that Pynson printed several of the year-books, but whether in this reign or the subsequent reign is uncertain. The printing of Lyndewood's Provinciale is ascribed to Wynken de Worde in 1496, it was reprinted in octavo in 1499, and in 1505 we find two other editions, one supposed to be printed at Paris and the other at Oxford.

Reeves' His. iv. 187.

Typog. Antiq.

Typog. Antiq.

CHAPTER XXIX.

HENRY VIII.

Union of Wales with England.—Abridgment of the Franchises.—Parliament.—Ecclesiastical Polity.—Fees of Ordinaries.—First Fruits.—Foreign Jurisdiction.—Court of Delegates.—Election of Bishops.—Dispensations.—Indulgences.—Style assumed by the King.—Different Styles of his Predecessors.—Dissolution of the Monasteries.—Marriage of the Clerks in Chancery.—Lawful Marriages defined.—First Fruits and Tenths.—Order of Precedence.—Poor Laws.—Aliens.—Common Recoveries.—Fines.—Uses.—Jointures.—Devises.—Leases. — Partition. — Gavelkind.—Descent tolling Entry.—Gifts to superstitious Uses.—Statute of Bankrupts.—Recognizances in the Nature of a Statute Staple.—Administration of Justice.—New Courts.—Office of Escheators.—Court of the Commissioners of Sewers.—Admiralty.—Court of Chivalry.—Court of the Steward of the King's House.—Proceedings of Courts.—Suing in Forma Pauperis.—Attaints.—Jurors.—Tales de Circumstantibus.—Jeofails and Amendments.—Limitations of Actions.—Restitution of Goods in Indictments.—Trinity Term.—Benefit of Clergy.—Abjuration and Sanctuary.—Penal Laws.—Game Laws.—Malicious Mischief.—Gypsies.—Maintenance.— Cheating.— Gaming.—False Informations. — Forfeiture.— Decisions of Courts.— Uses.—Lease and Release.—President of the Council of the North.—Court of Requests.—Chancery—.Assumpsit.—Form of the Statutes.—Reports.—Law Treatises.—Fitzherbert.—St. Germain.—Rastell Perkyns.—Law Printers.

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THE changes which the law underwent in this reign were numerous and remarkable, particularly those which concerned the national religion.

Union of Wales with England.

One of the most important acts of a political nature was that which united Wales to England, and completely esta-

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blished English law in that country, which had been but partially effected by the *Statutum Walliæ*. The power of the Lords Marchers, who had hitherto had the principal charge of governing the country, was now restricted by the appointment of a president and council, who formed a court, and gave redress in all cases of oppression committed by inferior jurisdictions. This court sat by force of the king's commission and instructions, and proceeded as in a court of equity. It was probably of great antiquity, for mention is made of a president of Wales in the reign of Richard II., but its jurisdiction was now enlarged by statute.

Stat. 34, 35 Hen. 8. c. 26.

Co. 4 Inst. 242.

In order to assimilate the policy of Wales completely to that of England, it was divided into twelve counties, in each of which there was to be a sessions called the king's great sessions in Wales, to be held twice a year before the justices who were to hold pleas of the crown. Besides the justices of the sessions, justices of the peace were also to be established, and numerous other regulations respecting the proceedings of courts and the police, so as to put the whole judicature of the country on an English footing. The inheritance of land was to be regulated by the rules of English tenures, except where the usages and customs of the place prescribed to the contrary. Moreover, all persons born in Wales were to enjoy the same privileges as natural-born subjects, and all laws and statutes were to be as binding there as in England. In order to render this union complete, the privilege of being represented in parliament was given to the counties and principal towns in Wales, by which twenty-seven members were added to the English House of Commons. By another statute the same privilege was communicated to the county palatine of Chester.

Stat. 27 Hen. 8. c. 26.

Abridgment of the franchises.

Stat. 27 Hen. 8. c. 21.

Another subject of a political nature, which engaged the attention of the legislature at this period, was the abridgment of the powers heretofore enjoyed by the owners of the counties palatine and other franchises. The power of pardoning was declared to be vested in the king, and none but the king could henceforth appoint justices in eyre, of assize,

of the peace, and of gaol-delivery, in all shires, counties palatine, and all other places in England and Wales. All writs and indictments were to allege facts as done against the king's peace, and not as formerly in a court-leet, *contra pacem domini*, or in the tourn, *contra pacem vicecomitis*; but they might be tested in the name of the person who had the county palatine or franchise. The justice of Chester and Flint were excepted from every alteration made by this statute. The bishop of Ely and Durham, and the archbishop of York, &c. were to be justices of the peace within their several liberties.

Of the petty principalities, whose powers were thus curtailed, there remained properly but three at this time who enjoyed *jura regalia*, these were Chester, Durham, and Lancaster. The earldom of Chester was, as we learn from Camden, united to the crown by Henry III., and has ever since given title to the king's eldest son. The duchy of Lancaster became the property of Henry Bolingbroke son of John of Gant, who, after wresting the throne from Richard II., procured an act of parliament, whereby the duchy with all its royalties was secured to himself and his heirs, kings of England, for ever, independent of the crown. In this form it descended to Henry V. and VI., and on the accession of Edward IV. it was declared to be forfeited to the crown, and was vested in that king and his heirs, kings of England, for ever. By another act in the first year of Henry VII. such parts of the duchy land as had been dismembered in the reign of Edward IV. were resumed, and the whole inheritance was vested in the king and his heirs for ever. The county of Durham was the only one which has remained in the hands of a subject with the abovementioned restrictions.

Camd. 682.

1 Comm. 118.

Parliament.

Stat. 6 Hen. 8. c. 16.

One act of parliament was passed in the 6th year of this king, respecting the proceedings of the House of Commons, which is entitled to notice in tracing the progress of this house to independence. It was enacted, in consideration of the many weighty matters which were often left to the end

of a session, that no member should depart or absent himself till the parliament was fully finished, ended, or prorogued, unless he had licence from the speaker and Commons, which licence was to be entered on record in the book of the clerk of the parliament: if any did otherwise, he was to lose his wages, and the inhabitants of the county, city, or borough, should be discharged thereof.

Another statute was passed in the 35th of this king for the better ordering the collection of the wages of knights and burgesses in Wales, from which we learn that the wages for a knight was four shillings a day, and for a burgess two shillings, reckoned from their setting out to their return home, with the costs of their writs, fees, and other charges. There were two writs framed for this purpose, namely, *de solutione fœdi militis parliamenti*, and *de solutione fœdi burgensis parliamenti*. These used to be sued out by the member, and two months after their delivery to the sheriff, the payment was to be made.

Ecclesiastical polity.

The laws regarding ecclesiastical polity were all directed towards reducing the power of the clergy and severing their connexion with the see of Rome, which had been in vain endeavoured by this king's predecessors, but was now fully effected by a series of parliamentary provisions. The first acts in order of time were passed in the 21st year of this king against the unreasonable exaction of fees for the probate of wills, for the regulation of indulgences, and the restriction of pluralities.

Fees of ordinaries.

Many provisions had been made by statutes and provincial constitutions, from the reign of Edward III. to the time of this king, to prevent extortionate fees for the probate of wills, but as these had not corrected the abuses, more definite provisions were now made by statute. Mortuaries or corse presents, though sanctioned by long usage, were now restricted in point of quantity, and in Wales were entirely abolished. Another statute in the same year prohibited the clergy from taking farms, or carrying on any traffic, which was looked upon to be inconsistent with their holy

Stat. 21 Hen. 8. c. 5, 6. 13.

profession. Also to prevent pluralities, against which many constitutions had in vain been made; in consequence of papal dispensations it was now ordained, that if any one having a benefice with cure of 8*l*. accepted another, and was inducted and instituted, the first should be adjudged vacant. All dispensations from Rome or elsewhere, contrary to this act, were declared void, and the procurers thereof subjected themselves to a penalty of 20*l*.

First-fruits.

The carrying property out of the realm, to meet the claims of the church of Rome, was the subject of many parliamentary provisions suited to the various pretexts under which these claims were made. First-fruits, that is, the first year's whole profits of any spiritual preferment, was one of the principal papal claims which is supposed to have been introduced in the reigns of John or Henry III.; and, notwithstanding the determined resistance made to it by the successors of these two kings, was either covertly or openly submitted to by the clergy. Edward III. expressly prohibited the pope's nuncio from collecting the first-fruits, declaring that it was a great novelty, and none of his subjects should pay it any longer. The same declarations were made by the kings Richard II. and Henry IV., the latter of whom termed it a horrible mischief and damnable custom. In this reign an effectual stop was put to this mischief. Before the king had come to an open rupture with the court of Rome, a statute was made in the 23d year of his reign, restraining the payment of first-fruits, and after the papal authority was entirely abolished, then the first-fruits were taken by the king. After this a court, called a Court of the First-fruits and Tenths, was established for the purpose of collecting them for the benefit of the crown.

Co. 4 Inst. 120.

Stat. 23 Hen. 8 c. 9. 20.

Stat. 26 Hen. 8.

Stat. 32 c. 45.

Foreign jurisdiction.

The statutes against foreign jurisdiction, passed in the reigns of Edward I. and III., as also those in the reigns of Richard II. and Henry IV., were now confirmed and enlarged in such definite and positive terms as to preclude all evasion. Further provisions were made the next year on the subject of appeals. An appeal was now given from the

Stat. 24 Hen. 8. c. 12.

Stat. 25 Hen. 8. c. 19, et seq

Archbishop's court, now called the court of the Arches, or audience to the king in Chancery; upon which a commission was to be directed to certain persons named by the king, as in the cases of appeal from the Admiral's court. This court has since been called the Court of Delegates.

Court of Delegates.

Convocation. Stat. 25 Hen. 8.

The jurisdiction of the convocation was also put under restrictions, so that no new canons were to be made without the king's licence, nor be put in force before they received the royal assent. A committee was likewise appointed with full power to examine the canons and to abrogate all such as should be found derogatory to the royal authority.

Election of bishops.

The election of bishops was put upon such a footing that all pretence for an application to the see of Rome for its concurrence was done away. All bishops were to be presented to an archbishop, and an archbishop to the other archbishop, or to any four bishops whom the king should name. When any see was vacant the king was to grant a licence or *congé d'elire* to the dean and chapter, and therewith to send a letter missive, containing the name of the person whom they were to elect, and if they delayed the election for twelve days, then the king was to nominate by letters patent. We have seen that in the reign of Henry I. the right of investiture was given up, and in consequence a freedom of election was granted to all prelates, both bishops and abbots. This was confirmed by King John, and afterwards by statute in the reign of Edward III. By the abovementioned statute of this king the bishops were prohibited from applying to the see of Rome for its concurrence on pain of a *præmunire*.

Ante, p. 56.

Stat. 25 Ed. 3.

Dispensations. Stat. 25 Hen. 8. c. 21.

By another act in this year, dispensations or licence for things not contrary to God's laws, but only to the law of the land, were to be granted by the archbishop of Canterbury, as had been formerly used, and the suing of such dispensations at the court of Rome subjected the offender to the penalties of a *præmunire*. The sale of indulgences was also put a stop to by another provision, which left it to the king and council to reform all indulgences and privileges which had been granted by the see of Rome.

Indulgences. Stat. 28 Hen. 8.

The matter of dispensations was the subject of another statute in the 28th year of this king, by force of which the court of Faculties was erected, for the purpose of granting dispensations and faculties. The officer in this court acting under the archbishop was called the Master of the Faculties.

All the abovementioned statutes, which were more remarkable for the spirit with which they were passed, than for any material changes which they produced in the law, were followed by an express declaration of the king's supremacy, which, as we have before shown, was successfully asserted and maintained by the Saxon kings, and likewise by some of our princes after the conquest, but not with equal success. In order, however, to convince the see of Rome and all the world that the king was in earnest in throwing off the supposed allegiance to the pope in ecclesiastical matters, he assumed the title of supreme head of the church, and had it confirmed by act of parliament, by which his style and title were settled in the following words, "Henry VIII. by the grace of God, king of England, France, and Ireland, Defender of the Faith and of the Church of England and also of Ireland, in earth the supreme Head." It was also declared high treason to deprive him of it.

Ante, p. 17.

Style assumed by the king.

Stat. 35 Hen. 8. c. 3.

This last measure is the more entitled to notice as it was altogether a novelty for our kings to submit the question of their style and title to parliament, which being heretofore looked upon as a personal matter, had been assumed by themselves at their own discretion. From coins, charters, and public instruments, we may gather the different styles which have been assumed by our kings at different periods. William the Conqueror commonly styled himself 'Wilhelmus rex,' sometimes 'Wilhelmus rex Anglorum;' his son Rufus, 'Wilhelmus Dei gratiâ rex Anglorum;' his son Henry I., 'Henricus rex Anglorum,' or 'Henricus Dei gratiâ rex Anglorum;' Maude, the daughter and heir of Henry I., wrote 'Matilda imperatrix Henrici regis filia et Anglorum domina;' Stephen used the style of Henry I.; Henry II. used the style, 'Henricus rex Angliæ,

Different styles of the king's predecessors.

Co. Inst. 7. Nichol's Engl. Hist. Library.

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dux Normanniæ et Aquitaniæ et comes Andegaviæ,' he having the duchy of Aquitaine and earldom of Poictiers in the right of his wife Eleanor, and the earldom of Anjou, Tourne, and Maine, as son and heir to Geoffry Plantagenet; Richard I. used his father's style, although king of Cyprus and Jerusalem, he never used either title; King John used the same style, with the addition of 'dominus Hiberniæ,' which he assumed in consequence of the conquest of Ireland in his 23d year; Henry III. styled himself the same as his father did until the 44th year of his reign, when he omitted 'dux Normanniæ,' &c. and wrote only 'rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ;' Edward I. and Edward II. both used this latter style; Edward the III. also used the same style until his 13th year, when he wrote 'Edwardus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ,' he being king of France, as son and heir of Isabel, wife of Edward II. and daughter of Philip the Fair of France; Richard II. and Henry IV. used the same style as Edward III., as did also Henry V. until his eighth year, when he wrote himself 'rex Angliæ, hæres et regens Franciæ et dominus Franciæ;' King Henry VI. wrote 'Henricus Dei gratiâ rex Angliæ et Franciæ et dominus Hiberniæ;' Edward IV., Richard III., and Henry VII., styled themselves 'rex Angliæ et Franciæ, et dominus Hiberniæ;' Henry VIII. added to his style, in the 13th year of his reign, 'Fidei Defensor,' and in his 22d year, 'Supremum caput Ecclesiæ Anglicanæ;' after which he styled himself 'Henricus octavus, Dei gratiâ Angliæ, Franciæ, et Hiberniæ, rex, fidei defensor, &c. et in terra ecclesiæ Anglicanæ et Hibernicæ supremum caput,' which was confirmed by the abovementioned act of parliament.

This king is said to have been the first to whom the title of majesty was addressed, although majesty was attributed to the king in the crime of *lese majesty*, and also on other occasions. It was, however, most usual at this time, as well as before, to address the king by the titles Excellent Grace, Sovereign Lord, Liege Lord, Highness, and Kingly Highness.

2 Hen. 4. c. 15.

Dissolution of the monasteries.

To return to our narrative, the most material change in our ecclesiastical polity, and the most violent inroad on the property of the church, was made in the 27th and 31st year of this king, when all the monasteries in England were dissolved, and the king became possessed of all the revenues of these houses. These he parcelled out, mostly among his courtiers and favourites; and thus, contrary to the intentions of the original donors, and to the statute of Richard II., increased the number of lay impropriations.

The primitive institution of suffragan bishops was provided for, and regulated by, a statute in the 26th year of this king, which empowered every bishop to appoint two honest and discreet spiritual persons within his diocese, of whom the king would appoint one to be a suffragan. The towns to which suffragans were appointed, together with their duties and privileges, were specified in this act. In his 33d year he erected, out of the ruins of the dissolved monasteries, several new bishoprics, that is to say, Gloucester, Bristol, Peterborough, and Oxford, which were annexed to the province of Canterbury, and that of Chester, and Sodor and Man, which were annexed to the archbishopric of York.

As Henry had gone thus far in throwing off all political connexion with the see of Rome, it is not surprising to find that, notwithstanding his professions of attachment to the doctrines and discipline of the Romish church, he should feel disposed to introduce some changes in the forms of the national religion. Accordingly we find, that an act was passed in the 34th year of his reign, empowering the king to appoint a commission of bishops and clergy to agree in a form of religion. But having set his subjects the example of thinking for themselves, and holding lightly what had been established, he endeavoured in vain, by several penal statutes in the 31st, 34th, and 35th, years of this reign against diversities of opinion, to fix them at the point he pleased.

Marriage of the clerks in Chancery.

Before we close this account of the enactments on spiritual matters, we must notice some few other points. As the six clerks, cursitors, and all others in Chancery, except the

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Stat. 14 and 15 Hen. 8. c. 8.

clerk of the crown, had originally been real clerks, they were of course unmarried, and on their marriage they of course forfeited their office; wherefore, an act was passed to relieve such persons from the forfeiture in case. It was also now thought best to throw open the ecclesiastical courts, which had hitherto been exclusively confined to the clergy; wherefore a statute, in the 37th year of this king, enabled all persons, lay as well as married men, being doctors of the civil law, to fill the post of chancellor, vicar-general, &c. and to exercise all ecclesiastical jurisdiction in the same manner as spiritual persons.

Lawful marriages defined.

Several statutes were made on the subject of marriage, in order to suit the convenience of this capricious king; but the only one entitled to notice was that passed in his 32d year, by which all marriages contracted by lawful persons, that is, persons not prohibited by God's law to marry, and duly solemnized, were to be held valid. The preamble to this statute states, as a reason for the act, that "what sparks remained of the papal legislation might kindle hereafter a great flame; and, at least, while they remained, might show that the pope's power was not entirely extinct."

First-fruits and tenths.

When first-fruits and tenths of spiritual preferments had become a part of the king's revenue, numerous provisions were made, in the 26th and following years, to ensure their regular payment, and to assist the spiritual courts in enforcing their process against defaulters.

Having taken this general view of the parliamentary provisions, which paved the way for still further changes in our ecclesiastical polity, we may next consider the statutes which related to the civil government, or the rights of individuals.

Order of precedence.
Stat. 31 Hen. 8. c. 14.

The subject of precedence, or the order of marshalling the higher ranks according to their dignity, was now, for the first time, matter of legislation. The preamble to the statute assigns as a reason, that "it was part of the king's prerogative to give such honour, reputation, and place, to his councillors, and others his subjects, as seemed best to his wisdom." It was therefore enacted, among other things,

that the king's vicar general, being his representative, as head of the church, was to sit on the right side of the parliament chamber, on the same form with the Archbishop of Canterbury, and before him. Next to the Archbishop of Canterbury, the Archbishop of York; and next to him the bishops, according to their ancienties. The officers of state, namely, the lord chancellor, lord treasurer, lord president of the king's council, and lord privy seal, and others, were, by virtue of their office, although only of the degree of baron, to sit on the left side, above all dukes, except such as were king's sons or brothers, &c. Dukes and other peers of lower degree, were to sit according to their ancienty, as had been accustomed.

Poor-laws.

Stat. 22 Hen. 8. c. 12.

To the statutes already made in regard to the lower orders some further provisions were now added. It was enacted, that those who were poor and impotent, and could not work, should have a letter given them, under seal by the justices in sessions, authorizing them to beg within a certain hundred, city, town, or parish; and, if any one begged without such licence, he was to be whipped and set in the stocks for three days and three nights, during which he was to be fed on bread and water. Against such as were able, but not willing to work, the statute was still more severe. Such persons, if found begging, were to be whipped until their backs were bloody; and they were to take an oath that they would return to the place where they were born or last dwelt; in which case they were to have a letter of licence to beg their way home; and, if they violated their oath, they were whipped all the way home. In the 27th year, a statute was passed which laid the foundation of our present system of poor-laws. It was then enacted, among other things, that officers of each place should take order for the reception and support of such as were unable to labour, and to gather alms on Sundays and festivals for their support; and that all persons passed in the manner above described were allowed, at every ten miles, to call on the constables of the place to provide them with meat, drink, and

Stat. 27 Hen. 8. c. 25.

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lodging, for one night. All children found begging were to be put under masters of husbandry or other crafts; and in case they were found again in a state of vagrancy, they were to be whipped, and to have the gristle of their right ear cut off; and for a third offence, to suffer death.

Aliens. Stat. 14, 21, and 32 Hen. 8.

Aliens, as before observed, were, by the common law, subject to various restrictions not imposed upon natural-born subjects; and now, by various statutes in this reign, in affirmance of one in the reign of Richard III., alien artificers were prohibited from working for themselves, and all leases of houses or shops taken by them were to be void.

7 Rep. 25.

Likewise, denizens, that is, aliens born, who obtained *ex donatione regis*, letters patent to make them English subjects, were required to pay the aliens' duty, and some other mercantile burdens.

Common recoveries. Stat. 7 and 21 Hen. 8. Stat. 32 Hen. 8. c. 31.

Common recoveries were now rendered a common assurance or conveyance, and provisions were made to give the recoverors the same advantages as had been enjoyed by the recoverees; as the liberty to distrain, and make avowries for rents, &c. On the other hand, they were restricted in their application to certain estates. A recovery of land against tenant by curtesy, tenant in tail after possibility of issue, or tenant for life, should be void in regard to those in reversion or remainder, unless it was by good title, or assent of those in reversion or remainder.

Fines. 19 Hen. 8. 6. 2 Dyer. Reeves' His. iv. 239.

Although the statute of Fines in the last reign was generally supposed to make a fine a bar to an estate in tail; yet as this was a serious alteration in the old law of real property, the judges were not agreed in their construction of the statute. The question was solemnly argued at Serjeant's Inn; when it was held by three of the judges, that the issue was not barred, and by five, that they were; the former maintaining that the issue were neither parties nor privies, but coming in as strangers; the latter, on the contrary, insisting that they were clearly privy to the fine levied by their ancestor. To set this question at rest, the legislature declared, in the 32d year of this king, that a fine levied

by a tenant in tail, of full age, according to stat. 4 Hen. VII. should be a sufficient bar to himself and his heirs, claiming by force of such entail.

Stat. of Uses, 27 Hen. 8. c. 10.

The statute of Uses, in the preceding reigns, not having obviated the inconveniences which were complained of, as attending this secret mode of conveyance, a fresh attempt was made in this reign to remedy the evil. To this end, the famous statute of Uses was passed in the 27th year of this king, which, after enumerating the evils resulting from such subtle-practised feoffments, fines, recoveries, abuses, and errors, proceeds to enact, that when persons shall stand seised of lands or other hereditaments, to the use, confidence, or trust, of any other person, or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life or years, or otherwise, shall from thenceforth stand and be seised, and be deemed in lawful seisin of the land, &c. in such like estate as they had in the use or trust; and the estate, title, right, and possession, shall henceforth be adjudged in them. Thus the statute executed the use as it has since been called, that is, transferred the use into possession; by which means the *cestui que use* became completely possessed of the land in law as he was before in equity. This is the substance of that statute, which in pleadings and deeds has since been distinguished by the name of the statute for transferring uses into possession, or the statute for conveying the possession to the use.

Reeves' His. iv. 244.

It was very soon felt that one consequence of this statute would be, to facilitate the conveyance to uses, particularly by means of bargain and sale, which had already become frequent. In order, therefore, to give this sort of transfer the notoriety which was so much desired, another act was passed in the same year, which directed, that no bargain and sale should enure to pass a freehold, unless it was made by indenture, and enrolled, within six months, in one of the courts at Westminster, or with the *custos rotulorum* of the county.

Ante, p. 434.

Stat. 27 Hen. 8. c. 16.

It was, doubtless, thought, by thus destroying the inter-

mediate estate of the feoffee, lands would no longer pass by limitation of use, but by formal livery of seisin; but, in order to guard against these secret transactions, which it was the object of the statute to put a stop to, it was thus ordained, that when they concerned any freehold interest, they should be by deed indented and enrolled.

Jointures.

Another provision of the statute had regard to jointures, which, as before observed, sprung out of the practice of conveying to uses. When, in consequence of the statute of uses, *cestui que use* became absolutely seised of the land, and the wife would have become dowable, it was found necessary, in order to prevent the double claim of dower and jointure, to provide that in making such an estate in jointure, the wife should be for ever barred of her dower.

Devises.

An important consequence of the statute of Uses was, that *cestui que use* had no longer the power to devise the land as at common law; no lands or tenements were devisable, except by the particular customs of some boroughs. This king, however, being more favourable than his predecessors to the removal of those restrictions which impeded the transfer of landed property, a statute was passed in the 32d year, which was revised and amended in his 34th and 35th years, enabling persons who held lands and tenements in socage to devise the whole, with a saving of the king's primer seisin.

Stat. 32. 34, 35 Hen. 8.

Leases.

Stat. Glouc. Co. 2 Inst. 324.

It appears that the remedy which the statute of Gloucester gave the lessee for years to recover against the lessor, when he suffered himself to be impleaded in a real action by collusion, did not extend to several cases in which the interests of termors were affected; for, if the lease were without writing, or a recovery was suffered by default, the termor could not recover his term. It was also supposed that tenants by statute merchant, statute staple, or *elegit*, could not have their remedy by this statute. In order to meet all these cases, a statute, in the 21st year of this king, directed, that all lessees should maintain their leases against the recoverors, and that no statute merchant, statute staple,

Stat. 21 Hen. 8. c. 15.

nor execution by *elegit*, should be made void by any feigned recovery. By another statute, in the 32d year of this king, a further provision was made to protect lessees against tenants in tail, so that, if any person seised in fee or in tail, in his own right, or in the right of his church, or his wife, or jointly with his wife, made a lease by indenture for years or life, it was ordained that it should be good and lawful, the same as if the lessor was seised in fee simple, provided it were not made to any lessee having an old lease unexpired, or not surrendered, and also not made in reversion. This was afterwards called the enabling statute, to distinguish it from the restraining statutes in Queen Elizabeth's time.

The dissolution of religious houses rendered another parliamentary enactment necessary in regard to lessors and lessees. As covenants in leases, like other covenants, could only operate between parties and privies, that those who were executors or heirs to the covenantors or covenantees, the grantees of reversions of land held of religious houses could not, after their dissolution, avail themselves of the benefit of covenants in leases granted to their tenants; and tenants, in like manner, were deprived of any advantages stipulated to them by the former landlords; wherefore, to remedy this inconvenience, a statute, in the 32d year of this king, gave mutual redress in all such cases.

Reeves' His. iv. 234.

Partition.

As inconveniences frequently arose in cases of joint-tenancy, where the parties were not willing to make partition, it was thought advisable, in the 21st year of this king, to compel joint-tenants, and tenants in common, to make partition, by the writ *de partitione faciendâ*, in the same manner as coparceners were compellable at common law. This act, which was confined to estates of inheritance, was afterwards extended, in the 32d year of this king, to estates for life or years.

Stat. 21 and 32 Hen. 8.

Gavelkind.

The old common law underwent an alteration in two particulars. By a statute, in the 31st year of this king, certain lands in Kent, which descended according to the custom of gavelkind, were thenceforth to be descendible as

Stat. 31 Hen. 8. c. 3.

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common-law estates. By another statute, the tolling entry by descent was taken away, for the dying seised on the part of the disseisor was not to be deemed a descent in law, so as to toll the entry of the disseisee, or his heirs, unless the disseisor had been in peaceable possession for five years after disseisin.

Stat 32 Hen. 8. c. 33.

Descent tolling entry.

The statute of Mortmain was now, agreeably to the temper of the times, extended against gifts to superstitious uses. A statute, in the 23d year of this king, made void all dispositions to the use of churches, chapels, &c. to the intent to have obits perpetual, or service of a priest for ever.

Gifts to superstitious uses.

Stat. 23 Hen. 8. c. 10.

On the subject of personal property, the statute of Bankrupts claims the first notice. Bankrupt, from *bancus*, a bench or table, used by the money-changers in Italy, and *ruptus*, broken, was so called, because they who could not carry on their trade had their benches broken, or, metaphorically, they were broken in their fortunes. We have derived the name, observes Lord Coke, as well as the wickedness of bankrupts, from foreign nations. The first parliamentary provision, he adds, was made against the Lombards; against Englishmen there were no complaints on account of fraudulent dealings until this reign. This observation may, however, be understood as applying only to the mercantile dealings of the English, whose failures in trade were looked upon as a criminal offence. The first statute of bankrupts, in the 34th year of this king, is entitled, "An Act against such Persons as do make Bankrupts;" who are described in the preamble, as "chiefly obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses." In order to defeat the frauds of such deceivers, the chancellor, the lord treasurer, and others of the privy council, the chief justice of the King's Bench, or any three of them, at the least, were authorized, upon complaint made to them, to take order concerning the goods and lands, and also with the body of the offender; to sell his effects, and to make such disposition

Statute of Bankrupts.

4 Inst. 277. Ante, p. 260.

Stat. 34 and 35 Hen. 8. 4.

of them among his creditors as that each might have a rateable part. They were likewise to call all persons before them, and examine them touching the offender's goods; and persons concealing them were to forfeit double the value. If the offender left the kingdom, and did not surrender after proclamation made, he was adjudged out of the king's protection. It is supposed that the framers of this act had an eye to the imperial law, which, softening the rigour of the Ten Tables, directed that, if a debtor ceded all his goods to his creditors, he was secured from being dragged to prison.

Taylor's Comm. in Leg. Dec. Barring. on the Stat. 2 Black. 472.

Recognizance in the nature of a statute staple. Stat. 23 Hen. 8. c. 6.

The law of recognizances, which had heretofore been contrived as a security for such as had dealings in the staple, was now, by an act in the 23d year of this king, made applicable as a security for the debts of persons of all descriptions.

Among all the revolutions for which this age was remarkable, not the least so is that which pronounced usury no longer an offence against either God or man. Our ancestors, in common with all other nations, had held this to be a heinous offence, as it afforded the greatest facilities to extravagance, dissipation, and ruin. As at the time we are now treating of, a spirit of commercial enterprise was rising, this made the impediment that the law threw in the way of raising money for present demands very irksome; and as men readily persuade themselves that that is right which they wish, the opinion became very prevalent that it would be good to do away with the laws of usury. The legislature yielded to this feeling, and, by an act, in the 37th year of this king, repealed all the laws against usury, and permitted the loan of money under certain restrictions, which have since been very much altered and modified.

Administration of justice. *New courts.* Stat. 27. 32. and 33 Hen. 8.

For the administration of justice some new courts were erected, particularly for the recovery of such revenues as had lately come to the crown; as the court of Augmentation of the Revenues of the Crown of England, the court of General Surveyors of the King's Lands; and the court of the King's Wards and Liveries, which had respect to the feudal

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tenures. All these matters had heretofore been under the government of the Exchequer; but, in consequence of the dissolution of religious houses, the king's revenue had received such accessions as rendered additional courts necessary. The two first were afterwards united into one, under the name of a court of Augmentation. The court of First-fruits, before mentioned, was abolished in the reign of Philip and Mary.

Office of Escheators.

The office, or court of Escheators, was put under some restrictions in the early part of this reign, in consequence of the abuses which had been introduced during the administration of Empson and Dudley. The complaint was, that sometimes untrue offices were found, sometimes they were returned though they were never found, and sometimes they were changed. The statute, therefore, among other things, enacted, that no escheator or commissioner was to return an inquisition or office, unless found or prescribed by twelve men. The inquisitions to be taken openly, and all evidence to be given in public. To ensure that the persons appointed to the office of escheator or commissioner should be duly qualified, they were to have lands of forty marks per annum; the jurors likewise chosen upon these inquests were to have lands of forty shillings annually. The time given by a statute in a former reign for traversing an inquisition was one month, but it was now extended to three months. Besides, all inquisitions found by the procurement of Empson and Dudley might be traversed, although the parties had already sued livery, it being declared that such livery should not conclude them.

Stat. 1 Hen. 8. c. 8.

Stat. 8 Hen. 6. c. 16.

Court of the Commissioners of Sewers.

The authority and commission of the court of the Commissioners of Sewers was now put into the form in which it has ever since remained. Sewer, from *sue*, or issue, that is, flow, was properly applied to drains, gutters, and all channels for water, but was extended to all walls, banks, and bridges, &c. the law relating to which is of great antiquity. Lord Coke observes, that the kings of this realm, before the making of any statute of sewers, might grant commissions

Stat. 23 Hen. 8. c. 5. Callis' Reading on Sewers, 24, 25. 10 Rep. 141, et seq.

for the surveying and repairing walls, banks, and rivers, and other defences; and examples of such commissions are to be found in ancient books and records, from the reign of Edward I. In the register, there are two writs or commissions, authorizing certain persons to survey the defences in the parts of Holland, in the county of Lincoln; and in the 38th of Edward III. a commission was awarded to inquire of bridges, and the repairs thereof. The first parliamentary enactment on the subject is to be found in Magna Charta, for the putting down weirs, and taking of fish. The stat. 25 Ed. III. extends to the putting down mills, mill-tanks, and causeys, which had been erected since the reign of Edward I. This was followed by the stat. 1 Hen. IV. and 12 Ed. IV., which enlarged and confirmed all former acts; but the first statute we have in print, wherein the frame of a commission of sewers is given, is the statute of 6 Hen. VI. c. 5, which was enlarged by the abovementioned statute of this king, on which a reading by Serjeant Callis, of Gray's Inn, in 1622, has been preserved.

Regist. De Aud et Term. 38 Ass. 15. Mag. Chart. 9 Hen. 3. c. 23.

Callis on Sewers

Admiralty.

Stat. 27, 28 Hen. 8.

A material alteration was made in the criminal judicature of the court of Admiralty, by two statutes, in the 27th and 28th years of this king. By the first, all offences of piracy and robbery, &c. done on the sea, were to be tried in such places of the realm as shall be limited in the king's commissions, directed to the lord admiral, or his deputies. By the second, it was enacted, that all offences committed upon the high sea, should be tried by commission of oyer and terminer, under the king's great seal, consisting of the admiral, or his deputy, and three or four more, among whom two common-law judges were to be of the number. Their proceedings were not to be according to the course of the civil law, by means of witnesses only; but according to the common law, by means of a jury.

Co. 4 Inst.

Court of Chivalry.

Co. 4 Inst. 123.

Stat. 26 Hen. 8. c. 13.

The criminal jurisdiction of the court of Chivalry, or of the court of the Constable and Marshal, as it was heretofore called, was now virtually done away; for it was provided by statute that all treasons, misprision of treason, or

CHAP. XXIX. HEN. VIII. Stat. 35 Hen. 8. c. 2.

concealment of treason, committed out of this realm, should be inquired of and determined in the King's Bench, by good and lawful men, or else before such commissioners, and in such shire, as should be assigned by the king's commission. After the attainder of the Duke of Buckingham, in this reign, the office of lord high constable ceased to be hereditary, no one afterwards being appointed, except *pro hac vice*.

Court of the Steward of the King's Household.

A new criminal court was erected, by statute, in the 33d year of this king, to be held before the lord steward of the king's house, to inquire of, hear, and determine, all treasons, misprision of treasons, murder, manslaughter, bloodshed, and strikings, in the king's palace. The punishment of malicious strikings, by the amputation of the hand, was, as defined in that statute, to be inflicted on the offender with every circumstance and ceremony calculated to inspire terror in the stoutest heart.

Proceedings of courts. Stat. 23 Hen. 8. c. 15. Stat. 21 Hen. 8. c. 19.

Some provisions were made in this reign for regulating the proceedings of courts. Process of outlawry was allowed in cases of forcible entry; and the process of debt, in actions of covenant and annuity. Costs were given to defendants upon nonsuit, or verdict in their favour, as had before been given to plaintiff.

Suing in forma pauperis.

To prevent abuses from the liberty of suing *in forma pauperis*, such plaintiffs, in case of nonsuit, or verdict against them, were not to be liable to pay costs, but to suffer some other punishment.

Jurors. Stat. 4 Hen. 8. c. 3. Stat. 35 Hen. 8. c. 6.

A more regular attendance of jurors was enforced by larger issues, and several provisions were made in order to ensure their qualifications. By another statute, a general provision was made to effect a due appearance of jurors at Nisi Prius. If a full jury did not appear, or after challenges there was likely to be a default of jurors, either plaintiff or defendant might pray a *tales;* and upon that the sheriff was commanded by the court to appoint from among the number of those present at the assizes as many as were necessary to supply the deficiencies. These subsidiary

jurors were called a *tales de circumstantibus*. Before this statute, the supply of jurors was effected in a less expeditious manner, for a writ used to issue to the sheriff to summon a certain number of jurors that were wanting. In the reign of Edward III., it appears that the plaintiff might pray a *tales* to the amount of ten, but no further; but, in after times, we read of *undecim tales*.

Tales de circumstantibus.

The villeinous judgments on attaints had, in the previous reign, been abolished for a time, by way of experiment. In this reign, attempts were also made to substitute a heavy fine in its place. Attaints were likewise henceforth to be taken in the King's Bench, and in the Common Pleas, and in these courts only. All these changes in this proceeding, which evinced its insufficiency for attaining the ends of justice, were only a prelude to its gradual disuse altogether.

Attaints.
Stat. 23 Hen. 8. c. 3.

The statutes of Jeofails and Amendments in former reigns were now considerably enlarged by additional provisions, all tending to do away with trifling and frivolous causes of exceptions in records and other parts of the proceeding, which had hitherto been impediments in the administration of justice. There is also one statute of this kind in regard to criminal proceedings, directing that for the future the omission of the words *vi et armis*, *videlicet*, and the like, in an indictment or inquisition, should not be a cause to avoid such indictment or inquisition by writ of error, plea, or otherwise. In other respects, however, the ancient strictness was still preserved in criminal prosecutions, so as to allow any exception which could reasonably be taken in favour of the life and liberty of the defendant.

Jeofails and Amendments.
Stat. 32 Hen. 8. c. 30.
Stat. 37 Hen. 8. c. 8.

Some provisions were made by statute for limiting actions both in civil and criminal proceedings. A writ of right was now limited to the period of sixty years, within which it was necessary for it to be brought. Other writs, or actions possessory, were limited to fifty years. Actions upon penal statutes were to be brought by the king within three years, and by any common person within one. It is here worthy of observation that in the time of Glanville and Bracton, when the

Limitations of actions.
Stat. 32 Hen. 8. c. 2.
Stat. 7 Hen. 8. c. 3.
Ante, p. 119.

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administration of justice was more immediately in the hands of our kings, the limitations of actions were determined by circumstances, which necessarily made them indefinite and variable. By the stat. Westm. 1, the reign of Richard I was made the time of limitation in a writ of right.

Restitution of goods in indictments. Stat. 21 Hen 8.

By the common law, restitution of goods could be had only upon an appeal, but not upon indictment, because this was at the suit of the king. Wherefore a statute, in the 21st year of this king, gave the same advantage in indictment as in appeal, which was growing more and more out of favour. Accordingly, if a person was convicted of larceny, by the evidence of any one, the owner of the goods might recover his property, or the value of it, out of the offender's goods, by a writ of restitution, in the same manner as in cases of appeal.

Trinity Term. Stat. 32 Hen. 8. c. 21.

An alteration was made in Trinity Term, in the 32d year of this king, by bringing it forwarder in the year. The reasons of this change are said to have been twofold; first, because in this season the plague and other sicknesses had frequently prevailed; and secondly, that it was a great impediment to the labours of those who were engaged in agriculture. Accordingly it was appointed, that in Trinity Term there should be but four return days, or four days on which writs should be made returnable; and that the term was to commence the Monday next after Trinity Sunday. Provision was also made to adjust this alteration to the return of writs of dower.

Benefit of clergy. Ante, p.434.

The law of clergy and sanctuary underwent some alterations in this reign. Benefit of clergy was, as we have seen, taken away in cases of desertion and petit treason; and, in the early part of this reign, it was also taken away from murderers and robbers. This circumstance, though trivial in itself, seems to have provoked the clergy more than weightier matters; for we find that, in a sermon preached by the abbot of Whichcome, at St. Paul's Cross, declared to the people, that this act was contrary to the law of God and the liberties of the church, and that all those who were

Stat. 4 Hen. 8. c. 2.

Reeves' His. v. 307.

parties to the enacting it incurred the censures of the church. In consequence of this attack, the question of the exemption of the clergy from the temporal jurisdiction was now revived, after having lain dormant, or, more properly speaking, having been set at rest for several centuries. The matter was, however, now twice solemnly debated, by the judges and the king's council, and was at length finally determined by the king's peremptory declaration, that "the kings of England who have gone before us never had any superior but God alone; and therefore know, that we will maintain the right of our crown and temporal jurisdiction as well in this point as in others, in as ample a manner as our predecessors have done before us." Accordingly we find that, by different statutes in this reign, benefit of clergy was taken away from those who were guilty of murder and robbery, of standing mute, of wilfully burning dwelling-houses, or barns with grain, as also their abettors and helpers. Likewise, housebreakers, and such as practised witchcraft, or any sort of enchantments. Persons actually in holy orders, that is, in the orders of a subdeacon, or above, were excepted from this act, so far as regarded the loss of life; but they were not suffered to make purgation, nor to be set at liberty, but were to be imprisoned for life; unless the ordinary chose to degrade any clerk convict, and send him to the King's Bench, where sentence of death would be passed upon him.

HEN. VIII. Keilw. 181.

Stat. 23 25. 27. 28. 33. and 37 Hen. 8.

The law of abjuration and sanctuary was now, likewise, put under some wholesome restrictions. As the compelling persons to abjure the realm was found to be attended with great inconvenience, the oath of abjuration was altered, so that the parties were now compelled to resort to some sanctuary; and, if they were found out of that place, they were to suffer death. Many of the abovementioned offenders, who lost the benefit of clergy, were also deprived of this indulgence of sanctuary. All these regulations paved the way for the total abolition of a practice which was found to be a great impediment to justice.

Abjuration and sanctuary.

Stat. 26, 27. and 32 Hen. 8.

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Penal laws.

Game-laws.

Stat. 14, 15. 25. 31 Hen. 8.

The penal statutes of this reign were numerous and severe beyond all precedent; but, as they were for the most part repealed in the next reign, it will not be needful to enlarge upon any here but what were permanent. The statute in the preceding reign against unlawful hunting was confirmed, with some additions respecting the king's grounds. Several regulations and prohibitions were made in regard to snaring, or otherwise taking hares and other game; as also the taking of wild fowl in the moulting season, or their eggs; and also in regard to fishing in any pond, or elsewhere, against the will of the owner. The offences in all such cases were punished with a fine, one-half of which went to the king, and the other half to the party suing. An exception was made in favour of any gentleman.

Malicious mischief.

Stat. 37 Hen. 8. c. 6.

It was likewise made felony to burn or destroy timber that was prepared for building; also the cutting the heads of ponds, and other species of malicious mischief.

Gypsies.

Stat. 22 Hen. 8. c. 10.

The Egyptians, or gypsies, as they have since been called, were now, for the first time, the subject of a statute, wherein they are described as outlandish persons, calling themselves Egyptians, using no craft or sort of merchandise; who came into this realm, and went from shire to shire, and place to place, in great company, and used great subtle and crafty means to deceive the people, bearing them in hand, that they, by palmestry, could tell men's and women's fortunes. Against these people, it was now enacted, that if any came within the realm, they were to forfeit all their goods and chattels, and leave the kingdom within fifteen days after they were commanded so to do, on pain of imprisonment. If they were to be tried for felony, they were not to have the benefit of the statute of Henry VI., which gave a jury *de medietate linguæ*.

Stat. 8 Hen. 6. 29.

Maintenance, &c.

Stat. 32 Hen. 8. c. 9.

Maintenance, embracery, and subornation of witnesses, were now severally punished by penalties in addition to those already imposed by previous statutes. Buying pretended rights and titles, having become very frequent since the introduction of uses, it was now prohibited, under penalty

of forfeiting the whole value of the land so fraudulently sold. By another statute, the punishments inflicted by the common law on cheating, were now rendered more severe. Any one convicted in the Star Chamber, of obtaining money by means of false tokens, or letters, was to be adjudged to suffer any corporeal pain except death.

Cheating.

Gaming. Stat. 33 Hen. 8. c. 6.

For the suppression of gaming, all persons were prohibited from keeping any house, or other place, where bowls, tennis, dice, and other unlawful games were used, on pain of forfeiting 40*s*. for every day they kept such houses; and those using such houses were to pay for every time 6*s*. 8*d*. The season of Christmas was excepted from this general provision; at which period, artificers, husbandmen, and servants in general, were at liberty to recreate themselves with these amusements. This statute likewise prohibits the use of the cross-bow, hand-gun, hagbut, or demihake, which having come lately into fashion, threatened to supersede the use of the longbow, in the expert management of which the English archers had hitherto been so renowned.

False informations. Stat. 37 Hen. 8. c. 10.

As the number of penal statutes in this reign afforded an opportunity for the gratification of private resentments, by ill disposed persons, who dropped papers conveying accusations of crimes against persons by name, it was thought necessary to suppress this practice by a statute, which made it felony, without benefit of clergy, to circulate any such charges by paper, unless the party so doing subscribed his name to it, and within twelve days appeared in person before the king or his council, and there affirmed the truth thereof, and did his endeavours to prove the charge.

Stat. 6 Hen. 8. c. 4.

To prevent secret outlawries a statute in the 6th of this king directed, that where, in any action personal, a defendant was described of one county, and an exigent was awarded in another, the justices should award a writ of proclamation to the sheriff of the county whereof the defendant was described, requiring him to make three proclamations in his county three different days. Any outlawry, pro-

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mulged in a foreign country without the award of such writ of proclamation, was to be void.

HEN VIII. *Forfeiture.* Stat. 26 and 33 Hen. 8.

The forfeiture of lands in cases of treason was extended by statute to estates in tail, to uses and rights of entry.

Decisions of courts.

The proceedings of courts in this reign consisted very much of discussions of the new points of law, and the alterations made by parliament in the matter of leases, fines, recoveries, and the like. As these occasioned much diversity of opinion there appears to be but few decisions entitled to notice.

Uses.

The statute of Uses did not set every question on this subject at rest. The principal matter in dispute was the condition of the feoffees, as to what interest and power remained in them when, at the instant of their appointment, the statute transferred the possession from them to the *cestui que use*; the courts seeming still to adhere to the notions respecting feoffees, which prevailed after the statute of Richard III. If, as is supposed, it was the intention of that statute to revive the old mode of conveyance of feoffment and livery of seisin, the end was so far from being answered that the contrary effect was produced; uses became a common mode of conveyance, and almost entirely superseded feoffments. Covenants to stand seised to uses, although discountenanced in former reigns, became frequent, and the decisions of the courts were in their favour.

Reeves' His. iv. 353. 34 Hen. 8. Bro. Feoff. al Use, 16.

Lease and release.

Another mode of conveyance, which acquired its force and operation from the statute of Uses, was a lease and release. This method of conveyance was doubtless derived from the practice alluded to in the reign of Edward IV., of first granting a lease, and then a release, by way of enlarging the estate. It is said to have been regularly introduced by Serjeant Moore for the convenience of Lord Norris. The course of proceeding in this matter was as follows: A bargain and sale was made for a term, which, as it did not come within the statute of Uses, did not require to be enrolled; and when the bargainee was in possession of the term, he

Reeves' His. iv. 356.

was in a capacity to receive a release of the inheritance, the deed of release containing the whole settlement of the estate so conveyed.

President and Council of the North.

Co. 4 Inst. 246.

Besides the alterations made by parliament in the jurisdiction of courts, this king, by his own authority, introduced some new judicatures, or remodelled others. A tribunal, under the style of the President and Council of the North, was erected by commission in the 28th year of this king, in consequence of the insurrections which had been occasioned in the north by the suppression of the monasteries. This court was framed after the model of the king's own council, having two commissioners, one of Oyer and Terminer, another empowering them to hold plea of real and personal actions, where either of the parties were so poor as to be unable to pursue the ordinary course of obtaining redress. A similar court was erected in the west in the 32d year of this king with the same authority, but it is supposed to have been but of short duration.

Court of Requests.

Another extraordinary jurisdiction, which was derived from that grand source of judicature, so often mentioned as residing in the king, and originally exercised in the Curia Regis, was the court of Requests, *curia Requisitionum*, otherwise called the court of Whitehall, which is supposed to have risen into consideration in this reign, although no mention is made of it, either by the book "Of the Diversity of Courts," nor by the "Doctor and Student," nor in any reports of this king's reign. But the stat. 32 Hen. VIII. c. 9, punishes perjury committed in the court of Whitehall; and Lambard says, that he had seen the books of entries from the 8th year of Henry VII., since which time it had usually been held at Whitehall. The matters heard in this court were principally such as concerned poor persons, or those of the king's household, which were commonly heard before some one or two of the council, together with a bishop, some doctors of the civil and the canon law, and some common lawyers, who were called Masters of the Requests.

Co. 4 Inst. 98.

Archion. 228.

Ibid. 229.

Ibid. 227.

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Chancery.

The jurisdiction of the court of Chancery was greatly enlarged during the administration of Cardinal Wolsey, who entertained all complaints of one description or another, and decided, with very little regard to the common law, which furnished matter of accusation against him when he fell into disgrace. Among other things, he was charged with having examined many matters in Chancery, after judgment given at common law, and obliging the parties to restore what was taken under execution of such judgments. He was also accused of granting injunctions without any bill filed; and when those would not do, of sending for the judges and reprimanding them. The business of this court was, in consequence of his proceedings, increased to that extent, that, as he found himself unable to discharge the whole duty in person, he caused different courts to be erected by commission from the king; one to be held at Whitehall, another before the king's almoner, Dr. Stokesby, afterwards bishop of London, a third at the Treasury Chamber, and the fourth at the Rolls, before Cuthbert Tunstall, who was then master of the Rolls, and used, in consequence of this appointment, to hear causes there in the afternoon. This is supposed by some to be the commencement of the jurisdiction since exercised by the master of the Rolls, who had heretofore been only the chief of the council of masters, assigned to the chancellor for his assistance, to whom the keeping of the rolls was committed.

Articles against Cardinal Wolsey. 20. 21. 26. Reeves' His. iv. 369.

Hist. Chanc. 55.

Reeves, ubi supra. Ante, p.213.

The dissatisfaction with the proceedings in Chancery did not terminate with the downfall of Wolsey. Notwithstanding the incorruptible integrity and indefatigable industry of his successor, he is said to have displeased the judges by the number of the injunctions which he granted. On hearing this, he invited all the judges to dinner one day, when he took occasion to lay before them a docket of all the injunctions he had granted; and, upon a full discussion of their several merits, the judges confessed that he could not have acted otherwise. It was common for the Chancery to give relief in cases like the following: When a man, bound in an obli-

Roper's Life of Sir T. More, 58.

Division of courts.

gation, was sued in a county where the deed was not executed, the obligor brought his bill, surmising, that by such foreign suit he was ousted of divers pleas, which he might have had if the action had been brought in the proper county. This was probably the subject of an injunction. The chancellor would also give relief in covenant made without writings if there were sufficient witnesses to prove them.

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Reeves' His. iv. 308.

Diversity of courts.

The King's Bench received an accession to its business from two causes, namely, from the decrease of real actions, and from the increase of actions upon the case; as also from the introduction of uses as a part of the common law, questions regarding which had heretofore been solely confined to the Chancery.

King's Bench.

Personal actions were now more clearly understood, and more fully explained than formerly. We have seen, that in the reign of Edward III., actions on the case were grounded upon malfeasance, or such instances of neglect as were in the nature of malfeasance. In the reign of Henry IV., an attempt was made to apply it to cases of nonperformance of a promise; but the courts were slow in allowing the name of trespass to be given to a thing that had never been done, and several actions of this kind were brought before they obtained a judicial decision in favour of the principle. In an action against a carpenter, *quare cum assumpsisset*, &c. to build a house within a certain time, it was objected that this was in covenant, and, as no writing was shown, that the action must fail. This objection was held to be fatal, but it was at the same time conceded, that if the writ had said that the work had been begun, and had afterwards through negligence been stopped, it might have been otherwise; thereby adhering to the idea of malfeasance and negligence. In the reigns of Henry VI. and Edward IV. the courts appear to have rejected the distinction between nonfeasance and malfeasance or negligence, and to have held that an action on the case would lie in all such cases. An action on the case, or an *assumpsit* as it was afterwards called, against a mill-

Ante. p 279.

Assumpsit.

2 Hen. 4. 3.

Reeves' His. iii. 245.

3 Hen. 6. 36.

maker for not making a mill against a certain day, the same objections were raised as usual against the writ, that it supposed a malfeasance, when it was only a nonfeasance and lay in covenant, but all the judges overruled the objection: nevertheless, such actions continued to be the subject of discussion even until the reign of this king, when it was by no means settled when such actions should be founded on torts and when on contracts. It was, however, now laid down, that when no other remedy was provided by the law, an action on the case would lie. The word *assumpsit*, though occasionally mentioned in the reports of that time, did not come into use to denote that action until the reign of Elizabeth.

New Cases, 7. 3 Hen. 7. 14. 27 Hen. 8. 24.

Detinue. 5 Ric. 3. 15. New Cases, 6. 33 Hen. 8. 6.

The action of detinue was now beginning to assume a new form. In some of these actions it was charged, that the defendant found the goods and converted them to his own use, or delivered them to persons unknown, or wasted them. From the word *trover*, to find, being thus employed, the action afterwards acquired the name of trover.

Statutes. Reeves' His. iv. 412.

The statutes of this reign assumed the form which they have since retained, and are remarkable for their immoderate length. The statute of wills, in the 21st year of this king, is the first example of this kind which seems to have served as a model of drawing up statutes for the future. As parliament was now acquiring so great a share in legislation, the framers of these acts were proportionably anxious to include under the statutes every provision, so as to diminish the discretionary power of the executive government as much as possible.

The same wordy style, and the same attempt at precision, was copied by the lawyers in their deeds of conveyance and other instruments, so that the language of the law became remarkable for the tediousness of its phraseology and the multiplicity of its repetitions.

Reports.

The practice of appointing stated reporters is supposed to have ceased in this reign, which may account for the scantiness of the year-book compared with that of former reigns.

The year-book of this king, which closes the collection of reports so called, contains only the 12th, 14th, 18th, 19th, 26th, and 27th, years, and in these years apparently only a selection of cases. Reporting was now left to professional gentlemen, who either, for their own use, or for the purpose of making them public, took notes of the proceedings. Accordingly we find, that the reports of this day, though not so ample as they were afterwards, are given by Sir James Dyer, with some scattered cases in Jenkins, Moore, and Benloe.

The language of all the reports at this period, and for some time after, continued to be law French.

Law treatises.

The law treatises of this reign are numerous from the pen of Fitzherbert, St. Germain, Rastell, and Perkyns.

Fitzherbert.

Fitzherbert, the most distinguished writer of this reign, and for some years a judge of the Common Pleas, was the author of the Grande Abridgment, Natura Brevium, and The Boke of Justices of Peas. The Grande Abridgment, a highly useful work, was first printed by Pynson in 1514, and again in 1516 by Wynken de Worde. It contains the cases down to 21 Hen. VII., and a great number of original cases which are to be found no where else. This work was an improvement upon Statham's Abridgment, and was in aftertimes materially improved upon by Sir Robert Brooke. It was held of such authority in its day, that it was admitted as good evidence to prove the custom of a manor. His Natura Brevium was an improvement upon an old work of the same nature and title before mentioned.

Ames' Typog. 260. 151.
Reeves' His. iv. 416.
Bridgeman's Leg. Bibl.
Bishop of Chichest Case, Godb 235.

St. Germain.

St. Germain acquired a considerable reputation by his work entitled "Doctor and Student." The first dialogue was printed in 1518 in Latin, under the title "Dialogus de Fundamentis Legum Angliæ et Conscientiâ." The second dialogue was printed in English, in 1530, and after passing through several editions in a distinct form, at length appeared united, under the title they now bear. To this writer is ascribed "A Treatise concerning the division between

Bridgeman's Leg Bibl.
Ames' Typ. Antiq. i. 477.
Reeves' His. iv. 422.

the Spiritualty and Temporalty," and some other smaller treatises.

Rastell.

Ames' Typog. i. 331. 474.

Rastell is the name of a family that distinguished themselves as law-printers and law-writers in that day. John Rastell, the first of the name, published the Tables to Fitzherbert's Abridgment in 1517, a translation from the French of the Abridgment of the Statutes, prior to the time of Henry VII., and the 24th of this reign. This was the first abridgment in the English language, and is introduced by a preface recommending the printing of law-books in English.

Bridgeman's Leg. Biog.

This John Rastell, who was brother-in-law to Sir T. More, quitted, as is said, the profession of the law, in order to follow the profession of a printer; and his son William, who for a time followed his father's business, quitted it for the profession of the law, and rose to the dignity of a judge in the reigns of Mary and Elizabeth. There was another son of this learned printer who bore his father's name, and having been a justice of the peace, was commonly called Justice Rastell.

William Rastell published his father's tables, and also his exposition of law terms, under the title of "Termes de Ley," the writing of which many have, on that account, ascribed to him. He also printed, in 1533, the Abridgment of the Statutes. This William is acknowledged to be the author of a collection of English statutes in 1559, and the book well known by the name of Rastell's Entries, printed long after.

Perkyns' Profitable Boke.

Among the valuable performances of this reign must be reckoned Perkyn's Profitable Boke, on the learning of conveyancing. This was first printed in 1532, under the title "Incipit perutilis tractatus Magistri Jo. Parkins interioris Templi Socii," &c.

Anonymous treatises. Ames' Typog.

The anonymous treatises of this reign are as follow: "Intrationum Liber," printed by Pynson in 1510. "Modus tenendi Curiam Baronis, &c." printed by the same in 1516.

The "Diversitie de Courts et lour Jurisdictiones, &c." attributed by some to Fitzherbert, was printed in 1525; and again in 1534, in 4to. with "Natura Brevium," "Old Tenures," and other pieces.

In 1527 appeared the "Carta Fœde," or the Chartulary, a book of precedents of feoffments, &c. attributed to William Rastell in 1540. The principal Laws and Customs and Statutes of England, in 1543. A book upon the office of sheriffs, in 1546. A Booke of Presidentes, &c.; also in the same year, Institutions, or Principal Grounds of the Laws and Statutes of England; and in 1547, a book, under the title of "The Attorney's Academy." Most of the abovementioned were repeatedly printed by different printers in the course of this reign, and many of them were translated into English.

Law-printers.

The principal printers of this reign were Pynson, Berthelet, John and William Rastell, and Robert Redman. Pynson was succeeded in 1529, in his appointment as king's printer, by Berthelet, who had this office granted to him by patent for life. Among the numerous editions of the statutes printed in this reign, that printed by Berthelet in 1531, with the common title of "Magna Charta cum aliis Statutis," is the most entitled to notice. This was followed, some months after, by another collection entitled "Secunda Pars veterum Statutorum," which, as we learn from the work itself, contained many statutes never before printed. It is worthy of observation, that the statutes began in this reign to be regularly printed after every session of parliament.

Reeves' His. iv. 423.

The printing of the year-books was now pursued with the same zeal as that of all other law-works, but they were mostly printed single. Those from the 22d to the 28th of Edward III. inclusive, were printed in one publication in 1552. The famous "Annus Quadragesimus" was not printed until 1534. Many remained unprinted at the close of this reign.

Among the ancient law-books, which were either printed or reprinted in this reign, the "Regyster of the Wryttes

CHAP. XXIX. HEN. VIII.

10 Rep. Procm. Reeves' His. iv. 426.

orygynal and judycyall" is particularly entitled to notice. This book, which is supposed to be the same as that which is called "Registrum Cancellariæ" in stat. Westm. 2, c. 24, is pronounced by Lord Coke to be the oldest book in the law; but this assertion cannot be admitted in an unqualified manner. By comparing the contents of the Register, with the writs in Glanville and Bracton, Mr. Reeves infers that they are both older works.

CHAPTER XXX.

EDWARD VI., AND PHILIP AND MARY.

Reformation.—Sacrament.—Election of Bishops.—Repeal of the Laws against Lollards.—Abolition of Chantries.—Acts of Uniformity.—Book of Common Prayer.—Nonconformists.—Revision of Ecclesiastical Law.—Marriage of the Clergy.—Brawling in a Church or Churchyard.—Poor Laws.—Gaming and Tippling prohibited.—Alehouse Licences.—Tillage and Husbandry.—Trade and Manufactures.—Sale of Offices.—Tithes.—Inquests of Office.—Loss of Dower for Treason or Felony.—Discontinuance of Actions.—Repeal of Treasons.—Administration of Justice.—Punishment of Clerks convict.—Witnesses in case of Treason.—Statutes of Philip and Mary.—Re-establishment of Popery.—Regal Dignity of a Queen.—Poor Laws.—Licences to Gaming-Houses abolished.—Distresses.—Sale of Horses.—Surveyors of the Highways.—Law of Treason.—Gypsies.—Benefit of Clergy.—Stealing Heiresses.—Bail.—Tales.—Witnesses in Treason.—Witnesses for the Prisoner.

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THE reign of this prince, though short, is rendered memorable by the completion of the Reformation, for which the proceedings in the former reign had fully prepared the way.

Reformation.

To change the forms of religion, to which the people had been endeared by long habit, was not unattended with risk and inconvenience. When the minds of men became unhinged, they naturally did not know where to stop; and when taught to disregard the externals of religion, they would be apt to despise religion itself, or to form very fallacious notions on the subject. To obviate these inconveniences was one of the first acts of the legislature in this reign. In the preamble to the first statute of Edward VI.,

Stat. 1 Ed. 6. c. 1.

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Sacrament.

concerning the sacrament, it is stated, that it is called in scripture a supper, the table of the Lord, the communion and partaking of the body and blood of Christ, but that many persons had condemned in their hearts the whole thing, on account of certain abuses heretofore committed in the misapplication of it. For this reason all persons were prohibited from depraving the sacrament by contemptuous words or otherwise, on pain of imprisonment and being fined at the king's pleasure. Likewise, by this statute, the communion of the sacrament in both kinds was to be ministered to the people within the church of England and Ireland, and the minister was not permitted to deny the same to any person.

Election of bishops. Stat. 1 Ed. 6. c. 2.

Repeal of the laws against the Lollards.

By another act the election of bishops was so far altered, that they were henceforth to be appointed by the king's letters patent. This was followed by a repeal of the laws passed in the reigns of Richard II. and Henry V., against the Lollards, also the statute in the preceding reign, concerning the punishment of Lollards and heretics; those against the six articles and those concerning the printing and reading the bible. All those statutes in particular, and every act of parliament concerning doctrine, were thereby repealed. At the same time penalties were inflicted on those who denied the king's supremacy, or affirmed that the bishop of Rome or any other person ought to be supreme head of the church of England and Ireland.

Abolition of chantries. Stat. 1 Ed. 6. c. 14. Stat. 2 and 3, 3 and 4, 5 and 6, Ed. 6.

In order to compleat the work of humbling the clergy, all charities, colleges, and free chapels, as also all lands given for the finding of a priest for ever, or for the maintenance of any anniversary, &c. were, by another act, given to the king.

Acts of Uniformity.

In the next and following years, the legislature was engaged in introducing a uniformity of service, and a due administration of the sacraments. As divers common prayers had of late crept into use, the archbishop of Canterbury was now appointed to draw up, with the assistance of some other bishops, one convenient and meet order of prayer and administration of the sacraments, which, when performed, was

entitled, "The Book of the Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, after the Use of the Church of England," which was directed to be used in all cathedrals and parish churches. In the 5th and 6th years of this king, this Book of Common Prayer underwent a revisal, to remove the doubts which had arisen about the service, "rather," as the act states, "by the curiosity of the ministers and mistakers, than for any other worthy cause."

Book of Common Prayer.

In order to enforce the reformation, by putting a stop to the Romish forms of worship, several provisions were made, prohibiting all vain, untrue, and superstitious services, such as antiphoners, missals, processionals, and the like. All persons and bodies corporate were likewise enjoined to take out the images in churches, and deliver them to the bishop; and not to omit so doing on pain of forfeiting 20*s*. for every prohibited book or picture, for the first offence; 4*l*. for the second; and for the third, imprisonment at the king's will. All persons were likewise commanded to attend their parish church or chapel regularly upon pain of the censures of the church.

Nonconformists.

In order to put to utter oblivion, as the statute says, the usurped authority of the see of Rome, as well as for the necessary administration of justice, this king, in imitation of his father, appointed thirty-two persons to examine the ecclesiastical laws, and reform them, besides appointing six prelates and six other persons, to draw up a form and manner of making and consecrating archbishops, bishops, priests, deacons, and other ministers of the church.

Revision of ecclesiastical laws.

The celibacy of the clergy had served as a powerful means of keeping that body true to the Romish church; wherefore it was thought necessary, at an early period, to abrogate all laws, canons, constitutions, and ordinances, which forbade marriage to ecclesiastical persons.

Marriage of the clergy.

Stat. 2 and 3 Ed. 6. c 21.

As the reverence for sacred places which had heretofore been protected by the common law, was now very much diminished by this revolution in religion, it was found

Brawling in a church or churchyard.

Stat. 5 and 6 Ed. 6. c. 4. Co. 3 Inst. 17.

necessary to enact, that quarrelling, chiding, or brawling, in a church, or churchyard, should subject the offender, on conviction, if a layman, to suspension, *ab ingressu ecclesiæ;* and, if a clerk, to be suspended from his ministerial functions, at the discretion of the ordinary. If any one smote, or laid violent hands on another, he was to be *ipso facto* excommunicate. For drawing a weapon, the offender was, on conviction, by verdict of twelve men, or by confession, or by two lawful witnesses, before the justices of assize, to lose his ears; and, if he had no ears, to be branded with the letter F. in the cheek, to denote him a fray maker, or fighter; and moreover to be deemed excommunicate.

Stat. 2 and 3 Ed. 6. c. 3.

Among the other statutes of this king, we find one on the subject of purveyance, which, since the time of Edward III., had not called for any further enactment. By a statute, in the third year of this king, the operation of purveyance was suspended for three years, except for barges, ships, carts, and things necessary for carriages, which were now fixed at a certain rate.

Inquests of office. Stat. 2 and 3 Ed. 6. c. 8.

Another statute for the ease of the subject was passed in regard to the untrue finding of offices. Persons holding terms for years, or by copy of court-roll, were often put out of possession by reason of inquisitions or offices, found before escheators or commissioners, entitling the king to the wardship or the custody upon attainders for treason, or felony, because such terms for years, and copyhold interests were not found; and so, likewise, because such interests were deemed only as chattels, the parties aggrieved could have no remedy by traverse, or *monstrans de droit.* To redress this and other similar hardships, it was declared that persons should, in all such cases, enjoy their rights and interests the same as if no office or inquisition had been found.

Poor-laws. Stat 1 Ed. 6. c. 3.

One inconvenience attending the suppression of monasteries was, that the sources of charity being now for a time materially diminished, the number of vagrants was exceedingly increased, insomuch that the statute passed on this subject declares them to be more in number than in other regions.

Wherefore, to remedy this evil, as it was hoped, by a measure of more than ordinary severity, it was now enacted, for the punishment of vagabonds and sturdy beggars, that any one, being apprehended, and convicted before two justices, upon proof of two witnesses, was to be branded with the letter V, and adjudged a slave to the person who brought and presented him. As this measure was so repugnant to the feelings of the nation as to prevent its being carried into execution, it was repealed in the 4th year of this king; and the ordering of the poor was regulated by the stat. 22 Hen. VIII., with the additional provision, that the vicar and churchwardens should keep a register of all householders in a parish, and also of all those who could not support themselves; and that the former were to be solicited every Sunday to give something in the shape of alms for the relief of the poor. This contribution was not to be altogether voluntary; for, if any one refused, he was subjected to an exhortation and remonstrance, first from the parson, and afterwards from the bishop, who, it is intimated, might, at his discretion, use coercion.

Stat. 3 and 4 Ed. 6. c. 16.

To prevent the increase of beggary and vice, gaming and tippling houses were laid under heavier restrictions. Two justices were empowered, by the statute, to put a stop to the selling of beer in common alehouses; and none were to keep such alehouses unless licensed in sessions by two justices; and at the same time they were to enter into recognizances not to allow unlawful games. Persons selling liquors without such authority might be committed for three days, and until they entered into the recognizances required.

Gaming and tippling prohibited.

Stat. 5 and 6 Ed. 6. c. 25.

Alehouse licences.

Many provisions were made in favour of tillage and husbandry, by securing to tenants the right of common, which had been granted to them by the statutes of Merton and Westminster 2. All persons recovering in an assize on those statutes was to have treble damages. The interests of trade and manufactures were also provided for by various enactments, in affirmance of the statutes of former reigns. To this end, the statute of the former reign respecting usury

Tillage and husbandry.

Stat. 3 and 4 Ed. 6. c. 3.

Stat. Mert. c. 4.

Stat. West. 2. 13 Ed. 1. c. 46.

Trade and manufactures.

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was repealed, and all persons prohibited from lending for gain, under pain of forfeiting the thing as well as the usury, besides being fined and imprisoned. Another chapter of the same act defines the punishment to be inflicted on those who offend against the rules of fair dealing, such as engrossers, forestallers, and regraters.

Stat. 5 and 6 Ed. 6. c. 20. Ibid. c. 14.

Sale of offices.

To secure the due discharge of official duties, the sale of any office which concerned the administration of justice, or the receipt or payment of the king's revenue, was prohibited on pain of forfeiting all right or interest in the office. The person making the offer of purchase was to be deemed incapable to hold the office, and all such transactions were declared void.

Tithes.

Stat 27 and 32 Hen. 8. Stat. 2 and 3 Ed. 6. c. 13.

The statutes in the former reign respecting the regular payment of tithes, were now confirmed and enlarged by several provisions, for the purpose of securing to the clergy their dues, and affording them a remedy in the spiritual courts against all acts of injustice in that matter.

Loss of dower for treason or felony.

Stat. 5 and 6 Ed. 6. c. 11.

By the common law, a woman lost her dower by the attainder of her husband for treason or felony; but by a statute, in the 1st year of this king, this point of law was changed in favour of the woman; it was, however, repealed, so far as regarded the crime of treason, by a subsequent statute, and the common law restored, so as to take away the wife's dower, in case of treason by the husband.

County courts.

It appears, that it had become a practice to hold county courts from six weeks to six weeks; wherefore it was enacted, by statute, in the 3d year of this king, that it should be held monthly, according to ancient usage, and not seldomer.

Discontinuance of actions.

An important alteration was made in regard to suits, which tended to relieve the suitor from much expense and delay. While our kings took so active a part in the administration of justice, it was considered that the death of a king must necessarily put a stop to all suits which had commenced in his name, or by his writ; but it was now enacted, that no suit should be discontinued by reason of the king's death, but that the judicial process was to be made out in the style of

Stat. 1 Ed. 6 c. 7.

the reigning king; and the variance in the names of such kings was not to be error. A similar provision was made in criminal suits, where, before this statute, if any one had been convicted of any felony before the king's justices, and the king had died before judgment, none could have been given; because the king was dead for whom the judgment was to have been given, and the authority of the justices was determined; but it was now expressly enacted, that no such suits should be discontinued by the publishing a new commission.

1 Ass. 8. 4 Ed. 4. 44. Dyer. 165. 2 Inst. 175. 2 Hawk. P. C. c. 1.

Repeal of treasons. Stat. 1 Ed. 6. c. 12.

As the reign of this king was characterized by mildness, it is not surprising to find that many of the harsh laws in the preceding reign were repealed. The preamble to the act which passed for this purpose, in the 1st year of this king, states, "that on the part of a prince, the people should wish for clemency and indulgence, and rather too much forgiveness and remission of royal power and punishment, than exact severity and justice to be showed." Yet it goes on, "sharper laws, as a harder bridle, should be made to stay those men and facts, that might else give occasion of further inconvenience." We are moreover informed that this was the consideration which led Henry VIII. to enact such severe laws, but that being no longer necessary, they might now be mitigated in their rigour. It was therefore ordained, that no act or deed should be deemed treason or petit treason, except such as was so by the stat. 25 Ed. III.; and all acts constituting new felonies since April 23, in the 1st year of Hen. VIII. were now repealed, with the exception of such statutes as concerned the coin of the realm; or the stat. 27 Hen. III. c. 2, against counterfeiting the king's sign manual, privy signet, or privy seal; and the stat. 27 Hen. VIII. c. 17, concerning servants embezzling their master's goods. On the other hand, some new treasons were made to meet the circumstances of the times, namely, the affirming that the king was not head of the church; or the interrupting the king in the quiet enjoyment of his crown. Besides, clergy was taken away from the following

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offences, namely, murder, poisoning, housebreaking, highway robbery, horse-stealing, and robbing churches or chapels.

Administration of justice. Stat. 2 and 3 Ed. 6. c. 24.

For the furtherance of justice against felons, two impediments were now removed which had heretofore existed. Where a person was feloniously struck in one county, and died in another, a lawful indictment could not have been taken in either, until given by the statute; and in like manner, where thieves had robbed or stolen in one county, aud carried their plunder into another, though the principal was attainted in one county, yet the jurors could not have taken cognizance of such attainder, and therefore the accessory went unpunished. To remedy these defects, it was enacted, that the jurors of the county where the death happened might inquire of, and an appeal might be brought of a stroke in another; and that an indictment against an accessory should be valid in the same manner as if the principal offence had been committed within the same county.

Punishment of clerks convict.

An attempt was made in this reign to change the punishment of clerks convict. Instead of being obliged to make purgation, as heretofore, they were to be made slaves for the space of a year, to any one who would become bound to the ordinary with securities in 20*l.* to take him into his service; but this extravagant punishment was of very short duration, as the whole act was very soon repealed.

Witnesses in cases of treason. Stat. 1 Ed. 6. c 11. Stat. 5 and 6 Ed. 6.

Concerning witnesses in cases of treason, there were two statutes in this reign, which required that there should be two witnesses or accusers, as they are called in one statute, on an indictment and trial for high treason, and that they should be brought face to face with the prisoner. These statutes are particularly entitled to notice, as they are connected with one passed in the subsequent reign. In order to understand the change which was effected in the law by this statute, it is necessary to call to mind, that in the original institution of the jury, jurors were regarded in the light of witnesses, who, from their personal knowledge of the facts, were to judge of the guilt or innocence of the party.

Ante, p.156.

So long as they were considered in this light, it was not necessary to call in other witnesses; but, when juries began to be less and less able to determine from their own knowledge, it is natural to suppose that they would call in other helps, such as that of reading the depositions of absent persons, hearing witnesses, and the like; and probably this may have become a settled practice of the courts long before this period. Lord Coke is of opinion, that two witnesses were required on a trial of high treason at common law. Whether this opinion be correct or not, it is to be presumed that this statute rather confirmed than introduced the practice of calling witnesses, to prove a charge of high treason. That clause in the statute, which required the accusers or witnesses to be brought in person before the party accused, must be considered as an innovation on the old practice. According to the original constitution of the grand jury, they were the indictors or accusers, who, like the petty jury, were supposed to make their presentment or accusation of any party from personal knowledge; and, when they ceased to be acquainted personally with the merits of the cases brought before them, they in all probability likewise availed themselves of all the evidence which they could collect from other quarters. It is clear, therefore, that as soon as they lost the character of witnesses, or accusers, prosecutions would not originate with them; and hence that accusers, or witnesses, became entirely distinct from jurors, and furnished the charge on which the indictment was laid and the accused was brought to trial.

*Statutes of Philip and Mary.**

Stat. 1 Mar. st. 2. c. 3.
Stat. 1 Mar. st. 2. c. 2.

Re-establishment of popery.

The reign of Queen Mary was commenced with the repeal of all the laws concerning the Reformation that had been passed in the preceding reign. Likewise, with a view of restoring the national religion to its old form, a provision was made against such as disturbed a priest or preacher in the exercise of his ministerial functions, or committed any act derogatory to the national worship, inflicting three months imprisonment on the offender, and additional penalties if he did not repent. The former statutes against heretics were revived in the first and second year of Philip and

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Mary, and the papal authority was put on the same footing as it was before the 20th of Henry VIII., by a repeal of the law against licences and dispensations, &c. But, lest this sweeping repeal of so many statutes, affecting church property, should bring the possessions of many into hazard, and introduce much contention, the parliament supplicated their majesties to intercede with Cardinal Pole, who was come over into England as legate *à latere* to reinstate the papal power, that all persons, and bodies corporate, as well as the crown, should enjoy all the possessions they were entitled to. Thus was the Romish religion once more re-established by law, precisely as it was before the 20th of Henry VIII.

Stat. 1 and 2 Phil. and Mar. c. 6.

Regal dignity of a queen. Stat. 1 Mar. c. 1.

The only act of a political nature was that in the first year of Queen Mary. As she was the first female who had ascended the throne, and all the statutes of the realm had heretofore attributed all prerogatives and pre-eminence to the name of king, some malicious and ignorant persons, says the statute, had pretended to think that she could not take the benefit and privilege of them; wherefore, to correct this mistake, it was enacted, that the regal office, with all its dignity, prerogatives, and power, whether invested in a male or female, was to be as fully deemed and taken in the one as in the other; and that whatever the law has appointed the king to have or do, the same the queen may enjoy and exercise without doubt or question.

Poor laws. Stat. 2 and 3 Phil. and Mar. c. 5.

The other acts of this reign were mostly in confirmation of former statutes. To the acts for the relief of the poor, a statute in the 2d and 3d of Philip and Mary added the provision, that if a parish was too small to support its own poor, licences might be granted under seal to such of the poor as the justices of the county thought proper to beg abroad; but as this was only a temporary measure, the management of the poor remained on the old footing until the next reign.

Licences to gaming-houses abolished. Stat. 2 and 3 Phil. and Mar. c. 9.

As licences to keep gaming-houses were much abused, they were now altogether abolished by a statute in the 2d and 3d year of this reign, which enacted, that every licence, placard,

or grant, for keeping any bowling-alley, dicing-house, or for any unlawful games, should henceforth be null and void.

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Distresses. Stat. 1 and 2 Phil. and Mar. c. 12.

Distresses, which had not been touched upon since the reign of Edward I., were once more a matter of parliamentary regulation. No distress was to be taken out of the hundred where it was first taken, nor any where except to a pound overt, and not at a greater distance than three miles from the place where it was taken. Goods taken by distress were not to be impounded in several places; and, for the more speedy delivery of cattle taken, the sheriff was authorized to appoint deputies for making replevies in his name.

Sale of horses. Stat. 2 and 3 Phil. and Mar. c. 7.

To prevent the disposal of stolen horses, some regulations were made for the sale of these animals in fairs and markets. The owner of the fair or market was to appoint a toll-collector, who was to take toll at the place marked out for the sale of horses, and to keep a register of all horses sold, specifying them by some particular mark.

Surveyors of the highways. Stat. 2 and 3 Phil. and Mar. c. 8. Ante, p. 9. Mag. Chart. 9 Hen. 3. c. 15.

The appointment of surveyors of the highways is dated from this reign, in the 4th year of which a statute was passed to that effect. By the feudal law, as it existed, both before and after the Conquest, the obligation to repair bridges and highways, attached to the tenure of lands, and formed one of the services comprehended under the name of the *trinoda necessitas*; but, owing to the changes which landed property had undergone, fresh regulations were now found necessary. By a statute in the 22d of Henry VIII., the repairing of bridges devolved for the most part on the county, when no one could be found to own them. And in this statute mention is also made of highways; but the particular officers, whose duty it was to inspect the state of the roads, and to see that the proper repairs were made by the several parishes, as also the persons on whom the duty devolved, were appointed to this office by the abovementioned statute. Their office was in some respects similar to the *curatores viarum* of the Romans, but was not equal to it either in dignity or importance.

Stat. 22 Hen. 8. c. 5. 1 Comm. 357.

Dalton's Just. c. 50.

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Law of treason.

Stat. 1 Mar. c. 6.

Ibid. c. 12.

Stat. 1 and 2 Phil. and Mar. c. 9.

A statute was passed on the accession of this queen, very similar to that passed in the preceding reign, for the repeal of all new-created treasons and felonies; but by subsequent statutes, some other treasons were created: as that which made the coining a particular species of coin that was current by the queen's consent treason, also another against riotous assembling, and a third for the punishment of slanderous and traitorous words of the king or queen.

Gipsies.

Stat. 1 and 2 Phil. and Mar. c. 4.

The provisions in the reign of Henry VIII. against gipsies, not having been found sufficient to restrain these people from coming into the kingdom, a penalty was now inflicted on any one who brought them in, and the gipsy was adjudged to be a felon without benefit of clergy.

Benefit of clergy.

Stat 4 and 5 Phil. and Mar. c. 4.

Benefit of clergy was taken away from accessories before the fact in petty treason, robbing in a house or on the highway, and wilful burning of houses. This was in affirmance of a statute in the preceding reign, which took away benefit of clergy from the principals in the same offences.

Stealing heiresses.

Ante, p.432.

Stat. 4 and 5 Phil. and Mar. c. 8.

The statute of Henry VII. against stealing heiresses was made severer by some additional provisions. That act only punished the offender when the offence was committed against the consent of the woman, but by this act he was subjected to fine and imprisonment, in some cases, where she did give her consent. If he deflowered, or married a woman child within the age of sixteen, he was to be imprisoned for five years and pay a fine, to be assessed in the Star Chamber. If any woman child, above the age of twelve, or under sixteen, consented to such marriage, then the next of kin, to whom the inheritance would come after her death, might immediately take and enjoy all her lands and hereditaments during the life of such person as should so contract matrimony.

Bail.

Stat. 1 and 2 Phil. and Mar. c. 13.

Reeves' His. iv. 492.

On the subject of bailing offenders, several regulations were made for the better administration of justice, in affirmance of the statute of Westm. 1, and that of Ric. III. and Hen. VII. By one clause of this statute, authority was given to examine the accused; which, observes Mr. Reeves,

is the first provision of the kind, giving authority to examine a man as to his own criminality, and seems to militate against the axiom that *nemo tenetur prodere seipsum.* This examination, as also the information of the party making the charge, was to be in writing, and to be certified to the next gaol-delivery. By a subsequent statute, this regulation, which was confined only to those that were let to bail, was extended to all cases where the party accused was committed to custody.

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Lamb. Eiren. l. 2. c. 7. Stat. 2 and 3 Phil. c. 10.

As the statute 35 Hen. VIII. c. 6, respecting the *tales*, did not extend to cases where the king was party, a statute in this reign directed, that in criminal cases, tried by writ of *nisi prius*, the attorney-general, or any prosecutor by his warrant, might pray a *tales*. The prosecutor in any penal action, who sued, as well for the crown as himself, might pray a *tales* without such warrant.

Tales. Stat. 4 and 5 Phil. and Mar. c. 7.

A statute of this reign respecting trials for high treason is entitled to notice, on account of its supposed operation on a similar statute in the preceding reign. This statute enacts generally, that all trials for treason shall be had and used only according to the order and course of the common law which at the time was supposed, by the unanimous opinion of the judges, to operate to the repealing of the statute of Edward, that required two lawful witnesses; but in the time of Lord Coke, and subsequently, a different opinion began to prevail, and finally was acted upon as a settled law. Another clause in this statute directed justices of the peace to bind by recognizances all persons to give evidence at the trial against the party indicted; from which period we may probably date the disuse of challenging any witness as an accuser, accusers being henceforth compelled to give their testimony as any other witness.

Of witnesses in treason. Stat. 1 and 2 Phil. and Mar. c. 10.

Dyer, 132.

Co. 3 Inst. 24.

Reeves' Hist. iv. 505.

As to witnesses in favour of the party accused, we have no mention of any thing of the kind before this reign; for by the civil law, which we probably followed in this particular, neither counsel nor witnesses were allowed on behalf of any one accused of a capital crime. It has, however, been

Witnesses for the prisoner. 4 Comm. 359. Hollingsh. 1112.

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cited to the honour of this queen, who, in matters not connected with religion, was the reverse of sanguinary, that when she appointed Sir Richard Morgan chief justice of the Common Pleas, she enjoined upon him, "That, notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party, her highness' pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard; and, moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject."

Stat. Trials, i. 55.

What relates to the decisions of courts, law-books, and other matters connected with the study of the law, will be considered hereafter.

CHAPTER XXXI.

ELIZABETH, AND JAMES I.

Reformation.—Common Prayer.—Heresy.—Thirty-nine Articles. Papal Power abolished.—Court of High Commission.—Commission of Review.—Simony.—Congé d'Elire.—Commerce.—Erecting Beacons, &c.—Court of Policies of Assurance.—Bankrupts. Poor Laws.—Gifts to Charitable Uses.—Support of illegitimate Children.—Apprentices. — Leases of the Clergy.— Nonresidences.—Leases of Colleges.—Enrolment of Fines.—Recoveries. —Fraudulent Conveyances.—Usury.—English Law of Tenure in Ireland.—Lord Keeper of the Great Seal.—Court of Exchequer Chamber.—Sittings in Middlesex.—Courts of the Universities.—Admiralty.—Justices of the Peace.—Proceedings in a Suit amended.—Malicious Suits.—Informers.—Compounding Informations.—Criminal Law.—Canonical Purgation abolished. —Statute Law under James I.—Concealment of Lands.—Concealors.—Dispensing with Penal Laws.—Monopolies.—Leases by Ecclesiastical Persons.—Administration of Justice.—Courts of Conscience in London.—Courts in the Marches of Scotland.— Privilege of Parliament.—Execution.—Abolition of Sanctuary and Abjuration.—Informers.—Jeofails, &c.—Vexatious Proceedings.—Extortions.—Limitations of Actions.—Larceny in Women.—Recusants.—Going out of the Realm.—Oaths of Allegiance and Supremacy.— Criminal Law. — Personating others.— Bigamy.— Drunkenness.— Blasphemy.— Bastards.— Game Laws.—Decisions of Courts and Common Law.

CHAP. XXXI. ELIZ. *Reformation.*

THIS reign was commenced, like the two preceding, with enacting laws on the subject of religion, whereby the Reformation was re-established on the same footing as in the time of Edward VI.

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Common prayer. Stat. 1 El. c. 2.

The statutes in the 2d and 3d of Edward VI. respecting the common prayer, which had been repealed in the 1st year of Mary, were now revived by Elizabeth, with additional provisions against ministers who omitted this form of prayer, and against all other persons who, in plays, songs, or other open words, spoke in derogation of it. Also the statute of Edward VI. against reviling the sacrament was revived, and further protection given to the ordinances then established. Those who absented themselves from their parish church or chapel on Sunday were subjected to a penalty of twenty pounds for every month.

Heresy. Stat. 1 El. c. 1.

As the prevailing notions with regard to heresy were now altered in consequence of the Reformation, it became necessary to determine, by an express enactment, what should be comprehended under this offence. Accordingly we find, that all statutes against heretics, from the time of Richard II. to that of Philip and Mary, were repealed in the first year of this queen; and heresy was now defined to be that which had been so declared by the words of the canonical scriptures, and the interpretations of the first four general councils, or what might hereafter be so declared by parliament, with the assent of the clergy in convocation. Likewise, by this statute, the jurisdiction of heresy was left as it stood at common law, namely, to the infliction of censures in the ecclesiastical courts; and in case of burning a heretic, to the provincial senate only, unless, as Sir Matthew Hale supposes, that this power resided in the diocesan. In all cases it appears, that the writ *de hæretico comburendo* was not demandable at common right, but only grantable at the discretion of the king. As a further means of producing uniformity of doctrine as well as worship, thirty-nine articles embracing the most important points of religion were agreed upon at a convocation of the church of England in 1562, and ratified by the queen, to which all persons before ordination were obliged to subscribe, and if any minister impugned these articles, he was, on conviction before the bishop, to be deprived of his living.

Hale, P. C. 405.

Thirty-nine articles. Stat. 13 El. c. 12.

Papal power abolished.

Other statutes were expressly levelled against the see of Rome. One statute inflicted penalties on any one who maintained the papal authority, another was passed against purchasing papal bulls. Several statutes were passed against recusancy, saying mass, perverting protestants and the like. In the last of these statutes, obstinate popish recusants, for so the Roman Catholics were now called, that is, those who within three months after conviction, refused to conform themselves to the obedience of the laws in coming to church, were to abjure the realm, and if any refused to abjure, they were adjudged to be felons without benefit of clergy.

Stat. 5 El. c. 1.
Stat. 13 El. c. 2.
Stat. 23. 29. 31. 35. El.

Court of High Commission.

The first act of this queen having revived the statutes 26 and 35 Henry VIII., which declared the king supreme head of the church, a clause was added to that statute for the purpose of restoring to the queen the jurisdiction in ecclesiastical matters which had heretofore belonged to the crown. By virtue of this act a court was erected, entitled "The Court of High Commission in Ecclesiastical Causes," which had authority to correct all errors, heresies, abuses, and enormities, and it was presumed, that this court had also authority to fine and imprison; but its jurisdiction was questioned in two points of view; first, as to what causes belonged to the high commissioners by force of the statute, and secondly, in what causes they might impose fine and imprisonment and what not. It appears to have been generally held in this reign, that the high commissioners ought to confine themselves to offences against the laws newly made for the protection of the reformed religion, and to proceed for the most part by ecclesiastical censures rather than by fine and imprisonment; so that, on complaint made to the judges, they frequently gave relief to such as felt themselves aggrieved by the high commission. In the 9th year of this king one Thomas Lee, an attorney, being called before the high commissioners and convicted of hearing mass, was committed to prison; but when the matter was brought, by *habeas corpus*, before the Common Pleas, the prisoner was discharged; Lord Dyer and the other judges

Co. 4 Inst. 324.

Ibid. ubi supra.

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concurring in opinion, that the high commissioners had not power to imprison in such a case.

Commission of review.

Although, by the stat. 24 and 25 Hen. VIII., the sentence upon appeals was made definitive for the most part; yet not in such a manner as to interfere with the prerogative of the crown; for the king or queen, after such definitive sentence, might grant a commission of review *ad revidendum*, by virtue of his authority as supreme head, and so it was resolved on different occasions in this reign.

Co. 4 Inst. 341.

Simony.

Stat. 31 El. c. 5.

The first statute on the subject of simony was passed in the 31st year of this queen, by which it was enacted, that if any patron, for any corrupt consideration, gift, or promise, directly or indirectly, presented or collated any person to an ecclesiastical benefice or such dignity, such presentation should be void, the presenter was to forfeit the double value of one year's profit of such living, and the person so corruptly seeking to be rendered incapable of enjoying the same benefice. The party indicting from corrupt motives, was also subjected to a similar forfeiture.

Congé d'élire.

Stat. 1 El. c. 1.

The stat. 25 Hen. VIII. respecting the election of bishops, which was repealed in the reign of Edward VI., was revived by a statute in this reign.

Commerce.

Stat. 1 El. c. 11.

The prerogative of the crown, in regulating domestic commerce, was recognised and confirmed by stat. 1 Eliz., which enacted, that the king might, by his commission out of the court of the Exchequer, assign the ports and places for the landing of goods, or loading any vessel. By a statute in the fourth year of Henry IV. it was enacted, that all merchandise entering into the realm of England, or going out of the same, should be charged and discharged in the great ports of the sea, and not in the creeks and small harbours of the rivers, unless compelled thereto by tempest, upon pain of forfeiting the merchandise so laden or unladen, &c.

Stat. 4 Hen. 4. c. 20.

Erecting beacons and light-houses.

By the common law, none but the king could erect beacons, light-houses, and sea-marks, for which commissions under the great seal used to be given, and afterwards by

letters patent to the lord admiral. By a statute in the eighth year of this queen, the Trinity Company were empowered to erect beacons, and other marks on the sea-coast, as they thought proper. By another chapter of the same statute was inflicted a penalty on any one who destroyed steeples, beacons, or any thing else that served as a sea-mark.

Co. 4 Inst. 148. Stat. 8 El. c. 13.

Court of Policies of Assurance. Stat. 43 El. c. 12.

For the better determining all controversies that arose between merchants on policies of assurance, a statute in the 43d year of this queen, authorized the lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, and two doctors of the civil law, to determine in a summary way all causes concerning policies of assurance. From the preamble to this statute we learn, that originally such matters had been referred to certain grave and discreet merchants appointed by the lord mayor, but that, in consequence of persons having withdrawn themselves from that course of arbitration, the statute above mentioned was passed.

Bankrupts. Stat. 13 El. c. 7.

The stat. 13 Eliz. enlarged the powers of the commissioners of bankrupts, so that they should be enabled to dispose of all the lands and tenements which the bankrupts had at the time of the bankruptcy. The statute expressly included, not only freehold, but also customary and copyhold lands, but not to estates tail further than the bankrupt's life; nor to equity of redemption on a mortgage wherein the bankrupt had no legal interest, only an equitable reversion: wherefore a statute was passed in the next reign to supply these deficiencies.

Poor-laws. Stat. 43 El. c. 2.

The poor-laws of former reigns underwent a revisal in this reign, so as to bring them into such a form as served for the basis of our present system. By a statute in the 43d year of this queen it was provided, that overseers of the poor were appointed in every parish by the justices of the peace, whose duty it was to raise competent sums for the necessary relief of the poor, impotent, old, and blind, such as were not able to work, and to provide work for such as were able and

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willing, but could not find employment elsewhere; for which purpose they were empowered to levy a rate upon the several inhabitants of the parish.

Support of illegitimate children. Stat. 18 El. c. 3.

To prevent illegitimate children from becoming chargeable to the parish under the existing poor-laws, and at the same time, for the punishment of the parents, a statute in the 18th year of this queen authorized two justices of the peace to take order of the father and mother, by charging them with the payment of money weekly for the relief of the child, on pain of imprisonment in case they failed to obey the order.

Gifts to charitable uses. Stat. 39 El. c. 5.

Another statute in behalf of the poor gave any private person the power of founding hospitals, alms-houses, and other charitable institutions, which heretofore could only be done by the king, or by his special licence. By this statute all persons seised of estates in fee were enabled, by deed enrolled in the court of Chancery, to erect hospitals and the like, which should be incorporated by such name as the founders or their heirs appointed, and should have capacity to take lands, not exceeding in value 200*l.* per annum, without licence or writ of *ad quod damnum*, and notwithstanding any statute of Mortmain; but such corporations were disabled from making leases for longer than twenty-one years, and reserving the accustomable yearly rent, which was payable for the greater part of twenty years before.

Visitors.

By another clause it was provided, that all hospitals, founded by virtue of this statute, were to be visited by such persons as were nominated by the founders, which was a deviation from the canon law, and the stat. 2 Hen. V., which gave the visitatorial power to the ordinary.

Apprentices. Stat. 5 El. c. 4.

Connected with the provisions for the poor, were the regulations which were made on the subject of apprentices. By a statute in the 5th year of this queen, justices might compel certain persons to be bound apprentice; and by the abovementioned stat. 43 Elizabeth, churchwardens and overseers might bind out the children of the poor to be apprentices with the consent of the justices. These statutes

likewise contain diverse rules and regulations respecting the qualifications of persons entitled to take and become apprentices, the term of years for which they were to be bound, and other terms of the indentures. The stat. 5 Eliz. also gave to every person, that had served his apprenticeship, an exclusive right to exercise that trade in any part of England; a law which has been differently regarded at different times. Lord Coke observes, "that this statute was enacted, not only that workmen should be skilful, but that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades."

Co. Inst. 55.

Leases of the clergy. St. 1. 13, 14. and 18 El.

In regard to private rights the most important enactments were those which imposed restrictions on leases. The first of these, which has been distinguished by the name of the disabling statute, made all leases, granted by archbishops and bishops, to be void, which exceeded the term of one-and-twenty years or three lives. This restriction was extended by the other statutes to inferior corporations, as also to beneficed clergymen in case of their nonresidence, who, if they were absent from their cures for above fourscore days in any one year, were besides to forfeit one year's profit of their benefices. A provision was likewise made for college leases, that one-third of the old rent then paid should, for the future, be reserved in wheat or malt, reserving a quarter of wheat for each 6*s*. 8*d*., and a quarter of malt for every 5*s*., which is said to have been an invention of Lord Treasurer Burleigh and Sir Thomas Smith, who observing that the value of money had sunk in consequenee of the late influx of bullion from the Indies, and that the price of provisions had risen proportionably, devised this method of upholding the reversions of the colleges.

Nonresidence.

Leases of colleges.

Enrolment of fines. Stat. 23 El. c. 3.

The stat. 23 Eliz. enacted in affirmance of the stat. 5 Hen. IV., that writs of covenant and other writs on which a fine should be levied, together with the return thereof, the *dedimus potestatem*, and every other circumstance connected with the levying a fine, should be enrolled.

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Recoveries. Stat. 14 El. c. 8.

Common recoveries suffered, by agreement of parties or by covin, against tenants by the curtesy, tenants in tail after possibility of issue extinct, or for term of life, were to be void, as against such persons to whom any reversion or remainder should appertain, unless such recoveries were suffered by their consent.

Fraudulent conveyances. Stat. 13 El. c. 8. Stat. 27 El. c. 4.

As the secret conveyances of lands and chattels were not done away by the statute of Uses in the reign of Henry VIII., two statutes were passed in this reign against all fraudulent and covenous feoffments, gifts, grants, and the like, with intent to delay or defraud creditors, which subjected the makers thereof to the forfeiture of one year's profits of the lands, and the value of all the goods and chattels so aliened, and as much money as should be contained in the bond; also all parties to such fraudulent conveyances were subjected to a similar forfeiture.

Usury. Stat. 13 El. c. 8.

The stat. 37 Hen. VIII. c. 9, in regard to lending money upon interest, which was repealed in the reign of Edward VI., was revived by a statute in the 13th year of this queen, which fixed the rate of interest at 10*l.* per cent., and ordained that all brokers should be guilty of a *præmunire* that made contracts for any more, and the contracts themselves should be void.

English law of tenure in Ireland. Gabbet's Pref. to Dig.

In regard to Ireland it is worthy of observation, that the system of English tenure was adopted in Ireland by force of some statutes passed in the Irish parliament during this reign, by which the grievous burdens of coyne and livery and other oppressive incidents of vassalage were abolished.

Lord keeper of the great seal. Stat. 5 El. c. 18. Seld. Office of Lord Chancellor.

Some few alterations were made by parliamentary enactment in regard to the jurisdiction of courts. It was enacted that the authority of the lord keeper of the great seal should be the same as that of the lord chancellor. Before this statute it appears, that the office of keeping the seals, though vested in the chancellor originally, was not invariably in his hands, there being examples to the contrary in the reigns of Henry III. and others. That the practice

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might become established, it was thought necessary to declare by statute, that these offices should be always united in the same person. This act passed during the chancellorship of Sir Nicholas Bacon. Another statute in the 43d year of this queen, gave jurisdiction over all charities to the chancellor or lord keeper, who might grant commissions for inquiring into any abuses of charitable donations.

Stat. 43 El. c. 4.

Court of Exchequer Chamber.

The court of Exchequer Chamber, erected in the reign of Edward III. for correcting errors in the court of Exchequer, was confirmed by two statutes of this queen, whereby a second court was erected, consisting of the justices of the Common Pleas and the barons of the Exchequer; before whom writs of error might be brought to reverse judgments in the King's Bench. To this court likewise all the judges occasionally adjourned, according to ancient usage, to deliberate on matters of difficulty referred to them from the courts below.

Ante, p.263.
Stat. 27 El. c. 8.
Stat. 31 El. c. 1.
Co. 4 Inst. 119.

Sittings in Middlesex.

Heretofore all actions on issues, brought in the county of Middlesex, used to be tried in the courts of Westminster; but in consequence of the increase of business in those courts, the stat. 18 Eliz. empowered the chief justice of the King's Bench and Common Pleas, the chief baron of the Exchequer, or in their absence any of the other justices, as justices of Nisi Prius, any time within ten days after the end of any term, to try all issues joined in the said courts, as might be tried by an inquest of the said county. The courts of Nisi Prius in London and Westminster, were afterwards distinguished by the name of sittings.

Stat. 18 El.

Courts of the Universities.

The two universities had hitherto enjoyed all their privileges by virtue of royal charters. All which privileges had been confirmed to them through a long series of years, from a very remote period of antiquity down to the time of this queen. Henry VIII. renewed the charter to the University of Oxford with more extensive privileges than had ever yet been granted, and Elizabeth made the same grant in the third year of her reign to the University of Cambridge; but notwithstanding the solemnity of these grants, it was thought

necessary to confirm them by an act of parliament passed in the 13th year of this queen, which serves to show the advances that parliament had made towards an independent share in the legislation, that even royal charters were scarcely deemed valid without the sanction of parliament. Sir Matthew Hale supposes the parliamentary confirmation in this case to be the more necessary, because the University courts proceeded by the course of the civil law, it being then held, that although the king might erect a court, yet he could not alter the course of the law by his letters patent. In confirmation of this he quotes a case when the chancellor of Oxford proceeded, according to the rule of the civil law, in a case of debt, the judgment was reversed in the King's Bench, and the principal error assigned was, because they proceeded "per legem civilem ubi quilibet ligeus domini regis regni sui Angliæ in quibuscunque Placitis et querelis infra hoc regnum factis et emergentibus de jure tractari debet per communem legem Angliæ."

Hale's Hist. Com. Law, c. 2.

8 Hen. 4. Rot. 72.

Admiralty.

Stat. 27 El.

The jurisdiction of the Admiralty was defined in affirmance of previous statutes, that it was to take cognizance of all offences done on the main sea or coasts of the sea, being no part of the body of any county, and without any precinct and liberty of the cinque ports, and out of any haven or pier. Hexham in Northumberland was declared in parliament in the 14th year of this queen to be no county palatine or franchise royal.

Co. 4 Inst. 134.

Justices of the peace.

The commission of the peace, which had from its commencement engaged the attention of the legislature in different reigns was, after the solemn deliberation of all the judges, in the 32d and 33d year of this queen, settled in the form in which it has, with some few alterations, ever since remained.

Proceedings in a suit amended.

Stat. 27 El. c. 5.

Several statutes were passed in this reign in affirmance of others in preceding reigns, for the removal of all unnecessary impediments in the prosecution of a suit to its termination. After demurrer joined and entered in any court of record, the judges were to give judgment in civil suits according to

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the merits of the case, without regarding defects in form. So likewise, after verdict, judgment was not to be stayed or reversed by reason of any default in form. The statute in the preceding reign, which permitted a prosecutor in any penal action to pray a *tales*, was extended to the defendant, who, in such actions might also pray a *tales*. Where the plaintiff wilfully delayed a suit, or suffered himself to be nonsuited, the stat. 8 Eliz. gave the defendant costs and damages.

Stat. 18 El. c. 14.
Stat. 14 El. c. 9.

Stat. 8 El. c. 2.

Malicious suits.
Stat. 8 El. c. 2.

For the prevention of vexatious arrests and malicious suits, any one who caused a person to be arrested in the name of another, was, on conviction, to be imprisoned six months, and to pay the party aggrieved treble costs, damages, and expenses.

Informers.

Owing to the number of penal statutes which now existed, and the encouragement which they held out to needy persons to bring informations for the sake of the forfeitures, two statutes were made in this reign, namely, in the 18th and 31st years of this queen, for the purpose of regulating this troublesome description of people, and in some instances inflicting corporal punishment on such persons, if convicted of malicious or oppressive proceedings. Among other things, compounding informations on penal actions, that is, taking any money or promise from the defendant, without leave of the court, by way of making a composition with him not to prosecute, subjected the offender to a penalty of 10*l*., two hours standing in the pillory, and to be for ever disabled from suing such popular action. On the subject of these informations, it is worthy of remark, that no prosecution could be brought by any common informer after the expiration of a year from the commission of the offence.

Compounding informations.
Stat. 18 El. c. 5.

Stat. 31 El. c. 5.

Criminal law.
Stat. 39 El. c. 17.
Stat 39 El. c. 9.
Stat. 31 El. c. 4.
Stat. 43 El. c. 13.

Among the additions to the criminal code, may be reckoned several new felonies; as, wandering about under the garb of soldiers or mariners; carrying away heiresses, in confirmation of the statutes in the reigns of Hen. VII. and Phil. & Mar. were made felony without benefit of clergy; also embezzling the king s stores; against moss-troopers, that is,

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those who carried away persons and imprisoned them, for the sake of getting a ransom, which was a frequent practice in the northern counties. Also the maliciously setting fire to stacks, privately stealing from a man's person, and even associating with gipsies, was felony, without benefit of clergy. Circulating false prophecies, for the sake of exciting sedition, subjected the offender, for the first offence, to imprisonment for a year, and forfeiture of goods; for the second offence, to imprisonment for life.

Stat. 8 El. c. 4. Stat. 5 El. c. 20. Ibid. c. 15.

Canonical purgation abolished. Stat. 18 El. c. 7.

One change was made in the old law, by the abolition of canonical purgation. By a statute, in the 18th year of this queen, it was enacted, that instead of delivering persons entitled to the benefit of clergy to the ordinary, as had been accustomed, they should either be discharged or detained in prison, as the justices should think fit.

Stat. 8 and 39 El.

Benefit of clergy was also taken away from cutpurses, and from those stealing out of a dwelling-house any thing above the value of 5*s*.

Statute law under James I.

In the four last reigns, the most important changes in the law were those which regarded religion. In the reign of James, they mostly concerned the prerogative of the crown.

Concealment of lands.

The first act of parliament of this nature, was that which respected concealments of lands belonging to the crown, which our kings had heretofore inquired into by a prerogative process, whenever they suspected that manors, lands, tenements, or hereditaments, were unjustly withheld. And this they might do without being restricted in point of time, by the statute of limitation, agreeably to the maxim that *nullum tempus occurrit regi*; so that, whenever the king wished, he might inquire into the title by which any subject held his land, let him or his ancestors have enjoyed quiet possession thereof ever so long. The mode of proceeding in these cases was commonly by means of letters patent of concealment, granted to particular persons, whom Lord Coke calls concealors, although more properly this term applied to those who actually concealed the land which belonged to the crown. The exercise of this prerogative was particularly

Concealors. Co. 3 Inst. 188.

called for in consequence of the dissolution of monasteries, which naturally lead to many acts of concealment on the part of those who wished to evade the laws, and also to many acts of oppression on the part of those who were authorized to detect the concealments. It is said that the first patents of concealment on record were granted, in the reign of Queen Mary, to Sir George Howard. By means of some obscure words in such a patent, it appears that, in the 39th year of this queen, the patentees would have swallowed up the greater part of the possessions of the bishopric of Norwich, if the industry of the then attorney-general had not defeated their purpose; in consequence of which an act was passed for establishing the bishopric; and, as a general provision for ensuring men the quiet and undisturbed possession of their lands and tenements, it was now enacted, that the king would not sue or impeach any person or persons, bodies politic or corporate, for any manors, lands, revenues, issues, forfeits, &c.; or make any title or claim, unless the king or his progenitors had been answered by force of any such right or title to the same within threescore years; or that the same had been duly in charge to his majesty, or to the late queen Elizabeth, within the said space of threescore years.

Co 3 Inst. 188.

Ibid. 191.

Stat. 39 El. c. 22.

Stat 21 Jam. I. c 2

Dispensing with penal laws.

The second statute was against those that obtained power to dispense with the penal laws, and the forfeitures thereof, which is stated in the preamble to be contrary to the law. It was one of the articles against the Spensers, that they procured the king to make many dispensations. In the 50th year of Edward III. Richard Lions, a merchant of London, and Lord Latimer, were condemned in parliament for procuring of licences and dispensations. This was also the offence with which Empson and Dudley stood charged, that for their own private gain, and by colour of their commission and office, they dispensed with the forfeitures on the penal statutes. To prevent a recurrence of these evils, which were pronounced by all the judges to be to the scandal of justice, the statute above mentioned declared all

Stat. 21 Jam. I. c. 3. Co. 3 Inst. 186.

Rot. Parl. 50 Ed. 3. No. 17. 28.

Co. 3 Inst. 187.

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charters, licences, and letters patent, granted to any person to dispense with any law, or statute, or to compound for any forfeiture, &c. to be void. But it was expressly provided by another clause of this statute, that it was not to extend to any warrant or privy seal, directed to the justices of his majesty's courts, to compound for the forfeitures of any penal statute depending in any suit before them.

Monopolies.

Nearly allied to these charters and grants for dispensing with penal statutes, were monopolies, which the same statute provides against. Monopoly, from the Greek μονος, alone, and πωλεομαι, to sell, signified literally, selling alone; and was here understood to signify a privilege allowed by the king to certain persons, to have the sole power of buying, selling, working, and using, any thing by which the liberty of others in trading was abridged. In the infancy of trade, such grants were made to particular towns or corporate bodies, in order to hold out to them an encouragement to engage in mercantile enterprises; but when such enterprises ceased to be attended with any particular risk, and numbers were found anxious to embark in such concerns, monopolies became injurious rather than otherwise to the interests of trade and commerce, and were eyed with great jealousy and ill-will by those who were excluded; so that now the king's power to grant such privileges began to be called in question. King Philip and Queen Mary, by their letters patent, granted to the mayor, bailiffs, and burgesses, of Southampton, that the wine, called malmsey, should be landed at no other place than at that town; but it was held by all the judges, that this grant, which was made in restraint of landing the same wine in different places, was against the laws and statutes of this realm. In consequence of this judgment, it was enacted, that all licences and privileges for the sole buying, selling, or working, &c. of any thing should be void, except as to patents not exceeding the grants of fourteen years to the authors of new inventions, also patents concerning printing, making saltpetre, gunpowder, great ordnance, and shot.

Co. 3 Inst. 182.

In the statute of the last reign, limiting the leases granted by archbishops and bishops to 21 years, or three lives, an exception was made in favour of the crown; but this exception was done away by a statute in the 1st year of this king.

Leases by ecclesiastical persons. Stat. 1 Jac. 1. c. 3.

Some few statutes were made for the better administration of justice; one of the most important of which is, that which established the court of Conscience, or court of Request, for the recovery of small debts, by a summary process, before commissioners appointed for that purpose. In the 9th year of Henry VIII., this court was erected by an act of the common council, which did not, however, receive the sanction of the legislature until this reign.

Administration of justice. 3 Comm. 81. Stat. 3 Jac. 1. c. 15. *Court of Conscience in London.*

One description of courts was abolished in this reign, namely, the courts in the East and West Marches of Scotland, as the occasion for them had happily ceased. They had been erected for the purpose of putting in force the border-laws, and preserving the peace between the inhabitants of the borders of England and Scotland. On the accession of this prince, the batable ground becoming quiet, all hostile laws were done away.

Courts in the Marches of Scotland. Stat. 4 Jac. 1. c. 1.

Doubts having existed, whether, if a person were taken in execution, and set at liberty by privilege of either house of parliament, a new writ of execution might issue against the party, a statute was passed, in the 2d year of this king, empowering the plaintiff to sue forth and execute a new writ after such time as the privilege of parliament had ceased.

Privilege of parliament. Stat. 2 Jac. 2. c. 13.

Where a person died charged in execution, it was held that the plaintiff had no further remedy; wherefore it was enacted, in the 21st year of this king, that a new writ of execution should be given against the lands, tenements, goods, and chattels, of the deceased.

Execution. Stat. 21 Jac. 1. c. 24.

The statutes in the preceding reign, against vexatious informations, had not met all the evils and grievances which sprung out of the abuse of the laws. As a further remedy against the evil, a statute was passed, in the 21st year of this king, for the purpose of repealing a number of old

Vexatious informers. Stat. 21 Jac 1. c. 4.

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Co. 3 Inst. 192.

obsolete statutes, to the number of sixty and upwards, which were now become unnecessary, and only served the purpose of being vexatiously employed as snares to entangle. Besides, in informations, the offence might be supposed to be committed in any county where the informer chose, where neither party nor witnesses were known; wherefore it was further enacted, that all actions upon penal statutes, brought by any common informer, were to be commenced and prosecuted in the county where the offences were committed. Likewise, the defendant was permitted to plead the general issue, and offer special matter in evidence.

Abolition of sanctuary and abjuration. Stat. 21 Jac. 1. c. 8.

Jeofails, &c. Stat. 21 Jac. 1. c. 13. Ibid. c. 23.

Vexatious proceedings. Stat. 21 Jac. 1. c. 8.

The old law of sanctuary and abjuration, after having been restricted by several statutes, was at length found to be fraught with so many inconveniences as to render its abolition expedient, which was accordingly effected by a statute in the 21st year of this king. Among the other statutes which had for their object the better ordering the proceedings of courts and officers, was one statute of jeofails, for limiting writs of error and preventing delays; another for preventing the vexatious removals of suits out of inferior courts; another for pleading tender of amends in an action of *quare clausum fregit*, whereby the plaintiff was barred from any other action; another, against those who, upon their oaths, or upon false suggestions and surmises, procured process of the peace or good behaviour against innocent persons; another, against the extortions of stewards of court leets; another, limiting actions upon the case to be brought within six years; actions of assault, &c. within four years; and actions upon the case for words, within two years after the cause of action.

Extortions. Stat. 1 Jac. 1. c. 5.

Limitations of actions.

Larceny in women. Stat. 21 Jac. 1. c. 16.

By a statute in the 21st year of this king, it was enacted, that women, in cases of larceny, where men would have the benefit of clergy, should be branded with the letter T with a burning-hot iron upon the brawn of the thumb.

Recusants. Stat. 1. 3. 7. Jac. 1.

To the statutes already enacted against popish recusants several severe provisions were added. Among other things, it was enacted, that they should be considered as excommu-

nicate, might hold no office nor employment, might not, without licence, depart five miles from their home, under pain of forfeiting all their goods, and also all their lands, for the life of the offender; they might not come into the king's presence under a penalty of 100*l*.; nor dwell within ten miles of London under the same penalty. They were incapable of presenting to any advowson; and, if women, they could not recover their dower. Persons sending their children to any seminary, or contributing to their maintenance, were disabled to sue in law or equity, to be administrators or executors, to take any lease or deed of gift; and were likewise to forfeit their goods and lands for life. Another clause in the stat. 3 Jac. I. also made it felony to pass the sea; but this latter provision, although particularly directed against the catholics, was in affirmance of statutes in the reigns of Hen. II. and Ric. III., and was also in conformity with the common law; for no person could at any time leave the realm without the king's licence, and that a writ *ne exeat regno* lay against any one to prohibit his leaving the kingdom. It was said that this writ was originally employed only in attempts prejudicial to the king and the state; but that towards the end of this reign, it was granted in the case of interlopers in trade; great bankrupts, in whose estates many persons were interested; in duels, and on other similar occasions, between subject and subject. It has since been commonly used in furtherance of justice; but Lord Chancellor Talbot held, that it ought not to be made use of where the demand is entirely at law, for there the plaintiff has bail, and he ought not to have bail both in law and equity.

Going out of the realm.

Writ ne exeat regno.
Regist. 89.
Bac. Ordinances, No. 89.

Another statute, which had particular reference to the papists, but which was of a general nature, was that which required all peers, privy councillors, judges, and other officers, before they entered upon the discharge of their several duties, as also all members of the House of Commons, before they took their seats, to take the oaths of allegiance and supremacy.

Oaths of allegiance and supremacy.
Stat. 7 Jac. I. c. 6.

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Criminal law.

Personating others. Stat. 21 Jac. 1. c. 26.

Among the offences which were the subjects of parliamentary enactment in this reign, may be noticed that of personating others as parties to a fine or recovery, or personating others as bail, who were not privy nor assenting thereto, which was made felony without benefit of clergy. The marrying a second husband or wife, in the lifetime of the former, which was now termed bigamy, was made felony. Any one convicted of being drunk, was subjected to the penalty of 5*s*. Blasphemy, or any profane scoffing at the Christian religion, on the stage, or in any public exhibition, subjected the offender to the penalty of 10*l*., one moiety to go to the king, and the other moiety to any one that would sue in any court of record at Westminster.

Bigamy. Stat. 1 Jac. 1. c. 11.

Drunkenness. Stat. 4 Jac. 1. c. 3.

Blasphemy. Stat. 3 Jac. 1. c. 21.

Bastards. Stat. 7 Jac. 1. c. 4.

Stat. 21 Jac. 1. c. 27.

By a statute, in the 7th year of this king, in affirmance and enlargement of one in the preceding reign, on the same subject, the justices were empowered to take the oath of any woman charging any man as the father of her illegitimate child, and to cause the reputed father to be apprehended and imprisoned, unless he gave sureties to indemnify the parish for the maintenance of the child. By another statute, in the 21st year of this king, it was enacted, that if any woman, concealing the birth of her bastard child, was suspected of having murdered it, she was to suffer death, as in other cases of murder, unless she could prove by one witness that it was born dead.

Game-laws. Stat. 1 and 3 Jac. 1.

Some addition was also made to the game-laws, by two statutes, in the 1st and 3d years of this king, which defined the qualification for keeping greyhounds to course deer or hares, to be an estate of inheritance to the yearly value of 10*l*.; or of a term for life of 30*l*.; or the possession of goods and chattels to the value of 200*l*. The qualification for killing deer, &c. with guns and bows, was still higher.

Decisions of courts.

What relates to the decisions of courts and the common law will be considered hereafter.

CHAPTER XXXII.

CHARLES I. AND II.

Statutes of Charles I.—Revenue of the Crown.—Ship Money.—Taking up Knighthood.—Forest Laws.—Grants of the Crown.—Administration of Justice.—Judicature of the Council.—Star Chamber and High Commission abolished.—Court of the President and Council of Wales.—Court of the President and Council of the North.—Court of the Duchy Chamber of Lancaster—Stannary Courts.—Court of the Clerk of the Market.—Statute Law under Charles II.—Convention Parliament.—Independence of the King.—King Generalissimo.—Army.—Parliament.—Oaths of Allegiance, &c.—Abolition of Military Tenures.—Revenue.—Excise.—Post Office.—House and Window Tax.—Hackney Coach Licences.—Subsidies.—Land Tax.—Corporation and Test Acts.—Act of Uniformity.—Habeas Corpus.—Writ de Hæretico comburendo abolished.—Petitioning restricted. Statute of Frauds.—Parol Conveyances.—Nuncupative Wills.—Statute of Distributions.—Naturalization.—Game Laws.—Sheriffs.—Statute of Jeofails.—Ecclesiastical Courts.—Prisoners in the Fleet.—Maiming.

CHAP. XXXII.

CHARLES I.

Statutes of Charles I.

All the statutes passed in the reign of Charles I. that are entitled to any notice, materially affected the prerogative of the crown, either as regarded the right of taxation, or the administration of justice.

Revenue of the crown.

Ship-money State Trials

The crown was deprived of two sources of revenue, which were supposed to belong to it by immemorial custom. The first of these was ship-money, which, on being imposed by King Charles, was resisted by Mr. Hampden and others. The question was solemnly debated before all the judges; and it was shown from records, that our kings might, and did, in

cases of pressing necessity and danger, command the Commons by writ, by virtue of their prerogative, and without consent of parliament, to furnish men and ships; and those who refused were punished by imprisonment, and the seizure of their lands and goods. It was contended, on the other hand, that in many of the cases cited, the parties summoned were to receive wages. The decision of the judges was unanimous in favour of the legality of the king's claim; but as the public feeling was so strong against the imposition, it was abolished by statute, in the 16th year of this king, together with other impositions, and any taxation otherwise than was declared by consent of parliament. Besides, by a statute in the same year, the king consented to give up his ordinary revenue, namely, the fees incident on any one's taking up his knighthood, which was not properly a tax, but a feudal profit, derived from his private relation with his tenants *in capite*. Of a similar nature was the profits which he derived from the forests, which he was also contented to forego.

Stat. 16 Car. I. c. 14.
Ibid c. 20.
Taking up knighthood.
Forest-laws.
Stat. 16 Car. I. c. 16.

Grants of the crown.
Stat 16 Car. I. c. 21.

In the statutes against monopolies in the former reign, the grants of the crown in respect to several things were excepted; but, by a statute, in the same year of this king, it was enacted, that no restriction should be laid on the importation or the making of gunpowder, saltpetre, and brimstone.

Administration of justice.

In regard to the administration of justice, many parliamentary enactments were made in this reign, for the purpose of either restricting, defining, or abolishing, the jurisdiction of such courts as derived their authority more immediately from the king.

Judicature of the council.
Pet of Right, 3 Car. I.
Rushw. Coll. i.

In order to bring the jurisdiction of the privy council within still narrower limits, it was declared, that neither his majesty nor the privy council have any jurisdiction in matters that ought to be tried and determined in the courts of Common Law.

Star Chamber and High Commission abolished.

The court of the Star Chamber, remodelled in the reign of Henry VII., was now abolished, as was also the court of High Commission in Ecclesiastical Causes, which was erected

by act of parliament, in the reign of queen Elizabeth. This latter court had, from the beginning, been eyed with much jealousy, and its jurisdiction was frequently called in question. The dissatisfaction was greatly increased by the exhorbitancies which it committed, by showing a very unseemly contempt of the common law. It even went so far as to neglect the prohibitions which issued from the superior courts, and to reprehend the judges for issuing the prohibitions. Besides that, it exceeded the bounds of its jurisdiction, and from an ecclesiastical court for the reformation of manners, it had grown into a court of revenue, and imposed heavy fines disproportioned to the offence. The abolition, therefore, of such an indefinite jurisdiction was considered as desirable rather than otherwise.

Clar. Hist. bk. iii.

Several other tribunals of a similar nature shared the same fate, namely, the court of the President and Council in the Marches of Wales, the court of the President and Council in the Northern Parts; the court of the Duchy Chamber of Lancaster, and the court of Exchequer of the county palatine of Chester.

Court of the President and Council of Wales.

The court of the President and Council in the Marches of Wales was a court of equity by prescription. It was confirmed by statute in the 34th year of Henry VIII. and abolished in the 16th year of this king.

Co. 4 Inst. 219.

Court of the President and Council of the North.

The court of the President and Council in the North differed from the preceding in that it was not warranted by act of parliament nor by prescription, but was erected by Henry VIII.; wherefore it was the more obnoxious, and called forth expressions of dissatisfaction before its final dissolution. This commission appears at first to have been little more than a commission of oyer and terminer, which was given in the 31st year of Henry VIII., for the suppression of the riots which the dissolution of the monasteries had occasioned in the north. Being found efficacious, it was continued longer than such commissions usually are, and was often renewed afterwards. In the reign of Elizabeth, it underwent some alterations, and was enlarged by several

Co. 4 Inst. 245.

Clar. Hist. bk. iii.

instructions relating to matters of state. Farther additions were made in the two succeeding reigns to this commission, which, during the presidentship of Lords Scrope and Strafford, were altogether assumed. The proceedings of the latter, in his judicial capacity as president of the north, formed a material part of the charge against that nobleman.

Court of the Duchy Chamber of Lancaster.
Co. 4 Inst. 204.

The court of the Duchy Chamber of Lancaster, at Westminster, was a court of equity, held before the chancellor of the duchy, or his deputy, concerning all matters of equity, relating to lands holden of the king in right of the duchy of Lancaster. The proceedings in this court were the same as on the equity side in Chancery. Against this court there appears to have been no particular objection; but falling under the general censure of an extraordinary jurisdiction, it was expressly abolished. But the court of the duchy of Lancaster, which was founded by act of parliament, in the reign of Edward III. and had a common-law jurisdiction, remained after the abolition of the former court, and took cognizance of all causes heretofore heard in the court of the Duchy Chamber.

Chanc. Rep. 55.
Toth. 145.
Hard. 171.

The court of Exchequer of the county palatine of Chester was also a court of equity, and of great antiquity, but was abolished expressly by name. The court of Requests before mentioned, although not named, was comprehended under the clause of the statute, which enacted, that no court should be erected within England and Wales having a jurisdiction like that of the Star Chamber.

Co. 4 Inst. 211.
Ante, p. 465.

Two other courts were limited in their jurisdiction, namely, the courts of the Stannaries, and the court of the Clerk of the Market.

Stannary Courts.
Co. 4 Inst. 232.

The Stannary Courts in Devonshire and Cornwall were, by virtue of a privilege, granted to the workers of the tin-mines, to sue and be sued in their own courts, holden before the lord warden. Their jurisdiction was regulated by special laws and customs, and existed by prescription time out of mind. This was confirmed to them by a charter of Edward I.; but, in consequence of complaints made by the

Commons, in the reign of Edward III., that these courts exceeded their jurisdiction, it was more particularly defined by the king, in the 50th year of his reign. At the period we are now treating of, the complaints against the oppressions of these courts were revived, particularly in consequence of the violent proceedings of the Earl of Pembroke, the warden of the stannaries, who, with expressions of contempt, disobeyed the prohibitions and writs of *habeas corpus* that issued from the court of King's Bench. Wherefore provision was made by the abovementioned statute against these encroachments and oppressions.

Clar. Hist. bk. iii.

Stat. 16 Car. 1.

Court of the Clerk of the Market.

The court of the Clerk of the Market was of some importance when there was a continual market kept at the gate of the palace, where this officer, called *clericus mercati hospitii regis*, because he was at that time a clerk, kept his court, and inquired of weights and measures, whether they were according to the standard or not, and took cognizance of misdemeanors therein. Such a court became afterwards incident to every fair and market; though grown so insignificant, that Lord Coke thought it needless, there being so many other courts to take cognizance of the same matters; yet it seems that the deputies and agents of the clerk of the market, who commonly farmed the perquisites within certain districts, occasioned many petty vexations, which it was the object of the statute to relieve. To this end, it was enacted, that no clerk of the market was to execute his office in any part of the kingdom, but only within the verge of the court, and that the execution of that office was to be committed to the mayors and bailiffs of towns corporate, and to the lords of liberties, &c.

Co. 4 Inst. 273.

Clar. Hist. ubi supra.

Statute law under Charles II.

Many salutary and important provisions were made by statute during the reign of Charles II.

Convention parliament.

As the two houses of parliament met, before the Restoration, by an act of their own, which was justified by the necessity of the case, it was thought expedient, in order to prevent this from being drawn into a precedent, to confirm all the proceedings of that parliament by an express act of

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the legislature. By another act, the independence of the king, and the inviolability of his person, was recognised; by another, the king was declared generalissimo within the kingdom, and the ancient power of the crown, in regulating the military and naval force of the country, was confirmed; and several provisions were made on the subject of the army by subsequent statutes. Among other things, the exportation of arms and ammunition out of the kingdom was prohibited under severe penalties; also the billeting of soldiers in private houses, without the consent of the owners, was prohibited; and the quartering of soldiers was assigned to innkeepers, stable-keepers, victuallers, and the like.

Stat. 12 Car. 2. c. 20. *Independence of the king.* *King generalissimo.* Stat. 13 Car. 2. st. 1. c. 6. *Army.* Stat. 14, 15. 31 Car. 2.

The constitution of parliament, as consisting of King, Lords, and Commons, was recognised and established by an express enactment, which repealed the act in the former reign, authorizing the Peers, in case the king neglected to call a parliament, to assemble, and issue writs for the purpose of assembling; and, in case of failure on the part of the Peers, that the constituents might meet, and elect one themselves. It was now declared, that parliament consisted of King, Lords, and Commons, and subjected any person to a *præmunire* that published the doctrine, that both houses of parliament, or either house of parliament, had a legislative power without the king. At the same time, in order to ensure a more regular meeting of parliament, another statute provided, that there should not be an intermission of more than three years after any sitting of parliament.

Parliament. Stat. 13 Car. 1. Stat. 16 Car. 2. c. 1.

To prevent the admission of improper persons into parliament, it was enacted, in affirmance of the stat. 7 Jac. I. that all members, before they were permitted to sit and vote in the House of Commons, should take the oaths of allegiance, supremacy, and abjuration; besides subscribing and repeating the declaration against transubstantiation and the invocation of saints.

Oaths of allegiance, &c. Stat. 30 Car. 2. st. 2.

The abolition of military tenures, which was effected by statute, was one of the most acceptable measures that could have been adopted, as thereby many intolerable grievances

Abolition of military tenures. Stat. 12 Car. 2. c. 24.

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Co. 4 Inst. 202.

and causes of discontent were removed. James I. had proposed a scheme for the abolition of these tenures, but the carrying of the plan into execution was reserved for the present period, which seemed peculiarly fitted for the accomplishment of an object so desirable. The principal and original purpose of these tenures was, to secure an efficient military force for the protection of the realm; but that end was not answered, when a compensation, under the name of scutage, was accepted in lieu of personal service. Nothing then remained but the pecuniary burdens of aids, wardships, and the other services which have been before described. These were now all done away by the statute, and all sorts of tenure held of the king, or others, were turned into common socage tenure, free of all the incidents which formerly belonged to this tenure, or that of knight's service, except rent, which was still due of common right on the death of the tenant. At the same time, purveyance and pre-exemption, which we have before seen were fraught with many mischiefs, were now altogether abolished.

3 Lev. 145.

As wardships were abolished by this statute, it was enacted, that it should be in the power of any father to appoint, by will, a guardian to his child, until he should attain the age of twenty-one.

Revenue.

To supply the deficiencies in the king's revenue, which the subtraction of the feudal profits, and the successive grants of the crown, had occasioned, was of course the next subject of consideration for the legislature. King James conceived the plan of securing an equivalent for the feudal profits by an annual fee-farm rent, which was to have been settled and inseparably annexed to the crown, and assured to the inferior lords payable out of every knight's fee within their respective seigniories. This plan appears to have been pursued in regard to inferior lords, but, in respect to the king, the principal equivalent for these concessions was the excise.

Excise.
1 Comm. 318.

The excise was a novel mode of taxing commodities, either immediately on their consumption, or more frequently

CHAP. XXXII. CHARL. II. Stat. 12 Car. 2. c. 23.

on their retail sale. It is said to have been first devised in the reign of Charles I., and was given to the crown by act of parliament as an equivalent for the profits of the feudal tenures, and although a very unpopular tax, it has been imposed on fresh commodities in every subsequent reign.

Post-office. Stat. 12 Car. 2. c. 35.

The post-office was another branch of revenue, which was now established by statute. It was first erected by King James I., and after having undergone successive improvements, and been very much extended in its plan, it was now put on a footing to increase the revenue, and to serve the public convenience.

House and window tax. Stat. 13 and 14 Car. 2. c. 10.

Another branch of the revenue, which was now first established by a statute in this reign, was hearth-money, afterwards known by the name of the house and window tax; a customary duty, as old as the Conquest, when it was called fumage, and vulgarly smoke-farthings. It was now revived, so as to form a part of the king's hereditary revenue, in the form of a tax of 2*s*., on every hearth in houses paying to the church and the poor.

Hackney-coach licences. Stat. 13 and 14 Car. 2.

A fourth branch of the revenue fixed by statute was the duty arising from licences to hackney-coaches and chairs, which were now increased from two hundred to four hundred.

Subsidies.

To these branches of the revenue may be added the old parliamentary mode of granting supplies by means of subsidies which were partially revived after the Restoration. In 1663 four subsidies were granted by the temporality and four by the clergy. After this a general tax on land, known by the name of the land-tax, was substituted in its place; from which time the clergy ceased to make any separate grant, and in recompense for this abridgment of their privileges, the beneficed clergy obtained the right to a vote at the election of knights of the shire.

Land tax. Gilb. Hist. of Excheq. c. 4.

Dalt. on Shir. 418.

Corporation and Test Acts. Stat. 13 and 25 Car. 2.

To prevent the recurrence of those political and religious dissensions which had lately convulsed the country, some acts were passed in this reign, in affirmance of some parliamentary enactments in former reigns. The most important

of these were the statutes in the 13th and 25th years of this king, known by the name of the Corporation and Test Acts, which required every person, elected to an office in a corporation, as also all officers civil and military, to take the oaths of supremacy and allegiance, and also to receive the Lord's supper, according to the rights of the church of England.

Act of Uniformity. Stat. 13, 14. and 22 Car. 2.

In consequence of some alterations made in the convocation, on the review of the Book of Common Prayer, another act of Uniformity was passed, in order to ensure the conformity of those who were engaged as public teachers, or in the instruction of youth. Attendance in any religious meeting where the Book of Common Prayer was not used, was prohibited under severe penalties; and those who either preached in conventicles, or suffered them to be held in their houses, were subjected to still heavier penalties.

As a contrast to these severe laws, which were called for from the state of the times, two acts in this reign, namely, the *habeas corpus* act, and that by which the writ *de hæretico comburendo* was abolished deserve to be particularly noticed.

Habeas corpus. Stat 31 Car. 2. c. 2.

The *habeas corpus* act was in fact but a confirmation and extension of the common-law writ of *habeas corpus* to all cases of imprisonment on every charge except that of treason or felony; but it was drawn up in such a definite manner as to remove all the doubts that had existed in the former reign.

Writ de hæretico comburendo abolished. Stat. 29 Car. 2. c. 2.

The statute, abolishing the writ *de hæretico comburendo*, at the same time abolished all the processes and proceedings thereon, and all punishment by death in pursuance of ecclesiastical censures, with the saving claim, that the jurisdiction of the ecclesiastical courts, in cases of atheism, blasphemy, &c. was not to be otherwise abridged thereby.

Petitioning restricted. Stat. 13 Car. 2. st. 1. c. 5.

As the privilege of petitioning parliament had been subject to much abuse, it was thought necessary to put a check upon it by a statute in this reign, which prohibited any person from procuring more than twenty names to any petition, either to the king or parliament, unless sanctioned by

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three justices, or the major part of the grand jury. The number to present any petition was not to exceed ten, on pain of incurring the penalty of 100*l*. and three months' imprisonment.

Navigation Act. 12 Car. 2. c. 18.

The most important act, for the support and advancement of the British navy, was passed in this reign, in affirmance of other statutes passed in the reigns of Richard II., Henry VII., and Henry VIII. This has acquired by distinction the name of the Navigation Act, from the number and importance of its provisions. Among other things it was enacted, that no goods should be imported into, or exported out of, any plantations or territories belonging to the king in Asia, Africa, or America, except in ships belonging to the people of England and Ireland, &c. whereof the master and three-fourths at least of the crew must be English. A statute in the subsequent year contains certain rules, articles, and orders, well calculated for maintaining order and discipline in the navy.

Stat. 13 Car. 2. st. 1.

Statute of Frauds. 29 Car. 2. c. 3.

Among the statutes affecting private rights, that which was passed for the prevention of frauds has acquired the name of the Statute of Frauds, because its provisions have been held to be most efficacious in preventing fraudulent conveyances or contracts. By this it was enacted, that all parol conveyances, or those made by word of mouth only, without writing, should be void, as also all leases, assignments, grants, or surrenders of any interest in any freehold hereditaments, unless put in writing and signed by the party. For the same reason it was enacted, by another clause, that no parol or verbal promise should be sufficient to ground an action upon in case of an executor, &c. This provision was particularly directed against the various fraudulent devices which had at different times been referred to in this history.

Parol conveyances, &c.

Nuncupative wills.

Nuncupative wills, which, before the introduction of writing, had been very general, were now likewise prohibited, with an exception in favour of mariners at sea, or soldiers in actual service.

The old law *de rationabile parte bonorum* was now con-

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Statute of Distributions. Stat. 22, 23. and 29 Car. 2.

firmed, in regard to the goods of intestates, by a statute called the Statute of Distributions, which directed that, after the payment of all just debts of the intestate, the surplusage was to be distributed in the following manner: To the widow one-third, and to the children or their representatives an equal share; and if there were no children, then one-half to the wife, and the other half equally to the next of kin of the intestate; and if there were neither wife nor children, then the whole in equal shares to the next of kin.

Naturalization. 7 Rep. 25. 11 Rep. 57.

Aliens might, as before observed, be made denizens, by what Lord Coke calls an incommunicable prerogative; but naturalization could be performed only by act of parliament. An Irish statute, in the 14th year of this king, was the first which naturalized all such foreign or alien merchants, &c. born out of the realm, being protestants, as chose to settle in Ireland. Another statute in the 29th year of this king, naturalized all the children of English subjects, born out of the realm, which was in affirmance of a similar statute in the reign of Edward III.

Game laws. Stat. 22, 23. and 25 Car. 2.

Some additions were made to the game-laws, particularly by the introduction of the use of gamekeepers, whom lords of manors of the degree of an esquire were authorized to appoint. These gamekeepers were to have power within the manor to seize guns, dogs, nets, and engines.

Sheriffs.

To prevent the burdensome expenses which attended the serving the office of sheriff, a statute in the 13th year of this king directed, that no sheriff should, at assizes, keep a table for entertainment of any persons but of his own family and retinue.

Statute of Jeofails. Stat. 16 Car. 2. c. 8.

The former statutes of Jeofails and Amendments were extended, by a statute in the 16th year of this king, so as to embrace every possible case of irregularity in the form of the proceedings, which had heretofore been made a plea for the reversing or staying judgment after a verdict given.

Writ of error. Stat. 16 Car. 2. c. 2.

The proceedings by a writ of error were facilitated by a statute in confirmation of stat. 31 Eliz. which provided, that the absence of the lord chancellor and lord treasurer in the

Exchequer Chamber, at the return of the writ, should not be any discontinuance, provided that both the chief justices with one of the great officers were present.

Ecclesiastical courts. Stat. 13 Car. 2 c. 12.

The jurisdiction of the ecclesiastical courts was now restricted in regard to the requiring of oaths *ex officio*, as they were termed, that is, oaths which, according to the canonical doctrine of purgation, bound a man to answer in any criminal matter that might be brought against him. Wherefore the ecclesiastical judge was henceforth prohibited from administering any oath which bound a man to criminate himself or subject him to censure or punishment.

Prisoners in the Fleet. Stat. 13 Car. 2. st. 2. Tidd's Pract. 365.

A difficulty seems to have existed heretofore in proceeding against prisoners in the Fleet prison at the suit of a third person; to obviate which the statute provided, that all persons having cause of personal action against any prisoner might sue forth an original writ, and that a *habeas corpus* should be granted to compel the defendant to appear.

Maiming. Stat. 22 and 23 Car. 2. c. 1.

The only act in regard to criminal law entitled to notice is that which made it felony without benefit of clergy to lay in wait for the purpose of cutting or slitting the nose, or otherwise maiming or disfiguring the person. This was in confirmation and extension of a statute in the reign of Hen. IV. It was called the Coventry Act, because it was occasioned by an attack made on Sir John Coventry, by some persons who it was said lay in wait for him, and slit his nose in revenge for some offensive expressions which he made use of in Parliament.

CHAPTER XXXIII.

CHARLES II.

Common Law.—Progress of Parliament.—Proceedings in Parliament.—Share of the Commons in Legislation.—Style of the Statutes.—Manner of voting Supplies.—Right of Imprisoning.—Standing Army.—Militia.—Tenures.—Copyholds.—Villenage.—Remainders and Reversions.—Contingent Remainders.—Executory Devises.—Merger.—Purchase.—Common Assurances.—Deeds.—Uses.—Powers.—Trusts.—Fines.—Recoveries.—Judicature of the Council.—Chancery.—King's Bench.—Common Pleas.—Court of Chivalry.—Courts Marshal, Marshalsea, and Court of the Palace.—Libel.—Ejectment.—Trover.—Assumpsit.—Proceedings in a Suit.—Modes of Trial.—New Trials.—Criminal Law.—Study of the Law.—Reports.—Law Treatises.—Inns of Court and Chancery.

Common law.

As the common law had now settled into the form in which it has ever since remained, except as it has been altered by statute, our account of it may now be closed with taking a review of the changes which it has undergone during the few last reigns.

Progress of parliament.

The first object of consideration is the state of parliament, and the steps by which the two houses of parliament had acquired such an independent share of the legislature as they now have. The High Court of Parliament, as it was styled, had now an extent of jurisdiction which Lord Coke describes to be transcendent and absolute, and not confined, either for causes or persons, within any bounds; so that we find at different periods acts of sovereign authority done by parliament, such as that of settling the succession to the throne, erecting courts, or remodelling courts, naturalizing aliens, besides more ordinary proceedings of making laws,

Ante, p.333.
Ante, p.256.

ratifying treatises and the like; in all which matters, by a frequent appeal to parliament in successive reigns, it had become a part of the law, that all matters of foreign and domestic policy should be referred to parliament.

Right of taxation.

The right of imposing taxes was one of the last points which our kings unconditionally surrendered. Edward III. we have seen expressly reserved to himself the power of levying taxes on extraordinary emergencies, and his successors, for the most part, acted on this principle; for there are examples of impositions laid, without consent of parliament, under the different names of assessments, benevolences, and loans, in the reigns of Richard II., Henry IV., Edward IV., Henry VIII., and Queen Mary, but more particularly of Charles I., whose proceedings in this matter led to the parliamentary enactments which set this question at rest.

Pref. to Stat. Cott Abrid. 406.
Stowe's Chronicle.

Proceedings in parliament.

The House of Lords had, even in the reign of Edward III., obtained all the privileges which it peculiarly enjoys, except, that while its proceedings were, either from want of experience or from the violence of the times, disorderly and without method, our kings were in the habit of rejecting much that was offered to them for their assent, even long after the two houses had an independent voice in the legislature. Even as low down as Queen Elizabeth we find, that it was not unfrequent for the proceedings in parliament to be stopped by a prohibition from the queen. She is also said, at the close of one session, to have rejected forty-eight out of ninety-three bills, public and private, which had passed the two houses.

Share of the Commons in legislation.

The voice which the Commons had in the legislature was, as before shown, exceedingly small. We are informed by a writer of this period, that before the reign of Henry VII. the Commons never presumed to print or publish any act or ordinance whatsoever, relating to the people, kingdom, or their own members, without the Lords' approbation and concurrence, nor to impose any tax or talliage without the assent of the King and the Lords. They never appointed committees or

Prynne's Pref. Cott. Abrid.
Crompt. Jurisdict. of Courts, 89.
Co. 4 Inst. 10, 11.
Cott. Abrid. passim.

sub-committees to hear, examine, or determine, any particular business without the prior consent of the Lords, that they never attached, fined, imprisoned, or censured, any one by their own authority, nor secured or expelled any of their own members, nor judged of the legality or illegality of elections, which belonged solely to the king and the Lords.

Reeves' His. iii. 225.

"The Commons," says Mr. Reeves, "who had been called to parliament in the reign of Edward I., merely to consent to taxes upon themselves and their constituents, when they had discharged that office were not any further considered, nor looked upon as a necessary part of the legislature." In the reign of Edward III. they made advances towards obtaining a share in the legislation, in which they succeeded so far as to get many of their petitions passed into a law. In the reign of Henry IV. they made an effort to take a part in the judicial proceedings of the upper house. On the occasion of an award, made by the king in parliament, of certain lands to a restored archbishop, the Commons, hearing of this, prayed that, since they were not made privy to this judgment, no record might be made to charge or make them parties therein; to which the archbishop by the king's command made answer, that the Commons in parliament were only petitioners, and that all judgments belonged to the king and the Lords, except in statutes and the like; a declaration which at all events favoured their pretensions to a share in the legislature. Still, in point of practice, this was exceedingly small, and continued so for many reigns. In that reign the same style was observed in the statutes as was before mentioned, the assent of the Lords being expressly mentioned in distinction from the petition, or complaint of the Commons. In the reign of Henry V. the language of the statutes was so far altered, from what it was in the former reign, that they are said to have been made by the advice and assent of the Lords Spiritual and Temporal, and at the special interest and request of the Commons of this realm. The style of the statutes in the reign of

Parl. Hist. ii. 50.

Style of the statutes.

Pref. to Statutes.

Henry VI. was as before, by the advice and assent of the Lords, and at the request of the Commons; except on one occasion, when it ran by the advice and assent of the Lords Spiritual and Temporal, and the Commons being in the said parliament, by the authority of the said parliament, made to be ordained and established divers ordinances and statutes, &c. In the reign of Henry VII. they had so far risen in public consideration, that petitions were presented to them; on which statutes were passed, in the eleventh and twelfth years of this king by merchant adventurers dwelling out of London, that they might resort to foreign countries, which was accordingly passed into a law. It is probable, therefore, that after the reign of Edward IV. they ceased to be petitioners. At least, there are no bundles of petitions extant beyond this period. Whilst the Commons were looked upon merely as petitioners, their petitions were dealt with as seemed best to the King and his council, or the King and the Lords; but when they rose in consideration, so as to become joint legislators, the mode of proceeding was altered, and the practice commenced of reducing the petitions in the first instance into the full and complete form of an act of parliament, which was entered in this form, "Item quædam petitio exhibita fuit in hoc Parliamento Formam Actus in se continens." When the proceedings of the Commons ceased to be termed petitions, then acts of parliament were drawn up under the name of bills, and after having passed through the two houses, were brought to the sovereign for his assent, which was the reverse of the ancient practice, when every proceeding emanated from the king and his council, and nothing was laid before parliament but what the king thought proper. The Commons had been long striving to obtain this object, but made very slow advances before the reign of Henry VII. In consequence of the law against the Lollards having passed without their assent, and contrary to their remonstrance, they petitioned, in the 8th of Henry IV., that certain of the Commons' House should be present at the engrossing of the parliament-roll. Al-

Stat. 11 Hen. 7. c. 19.

Stat. 12 Hen. 7. c. 6.

Hale's Hist. c. 3.

Ante, p. 239.

Hale, ubi supra.

Cott. Abrid. 456.

though this petition was complied with, yet the evil was not remedied, for they found occasion, in the subsequent reign, to remonstrate, when they contended, that considering they were as well assentors as petitioners, statutes should be made according to the tenor of their petition, to which the king in his answer assented; but no material alteration, however, took place in the course of parliamentary proceedings before the time above mentioned. In the reign of Henry VIII. the statutes begun to be penned in such form as fully to recognise the assent of the Commons as well as Lords. In addition to this we find, that in one case they hesitated in giving their assent, and the bill did not pass until they were satisfied. In the reign of Edward VI. they took so active and important a part in the legislation, as to remodel bills, and to refuse their assent on several occasions.

Parl. Hist. iii. 80.

Manner of voting supplies.

In the reign of Edward III., and long after, each house voted its own supplies, the votes of the Commons being always subject to the approbation of the Lords; but as their proceedings grew more regular, and the two houses acted more in concert, it became the practice for the Commons, probably because, from their habits of life, they were more familiar with pecuniary calculations, to determine the question of supplies first, and then submit their vote to the approbation of the Lords. In the reign of Elizabeth they began to set up the claim, that all money-bills should originate with them; and in the reign of Charles I. they resented it as a great indignity, when the Lords ventured to recommend them to vote a supply for the king, and (as we are informed by the historian of those times) the house, with one unanimous consent, declared this so high a breach of privilege, that they could not proceed upon any other matter, until they had first received satisfaction and reparation.

Ante, p. 247. Prynne's Pref. to Cott. Abrid.

Clar. Hist. bk. ii.

In the reign of this king the Commons went further in their pretensions, maintaining that the Lords could make no amendments whatever in bills, which either directly or indirectly laid a charge upon the people. On what grounds they founded a claim, so much at variance with the practice

Hallam's Hist. ii. 372. Commons' Journ. Lords' Journ. July, 1661.

of former times, we are not informed; but it should seem, that notwithstanding the objections made by the Lords on different occasions, this point of privilege has at length been surrendered to the Commons.

Right of imprisoning, &c.

Ante, p.253.
Prynne's Pref. to Cott. Abrid

We have seen that, in the reign of Edward III., the king asserted it as his prerogative to punish offences done in parliament in his own courts, and that as respects the peers, the point was then left undecided. The Commons were, however, for a long time, indisputably subject to this control. As late as the reign of Queen Mary we read of a number of the Commons, who, having thought proper to withdraw from parliament, were indicted, by order of the queen, for a contempt. Six of them submitted themselves to the queen's mercy and were fined. The rest, among whom was the famous lawyer Plowden, traversed, but the death of the queen prevented any judgment. It appears, however, that previous to and during this reign, the Commons were in the practice, either by force of the statute in the reign of Henry VIII., or by the particular command of the king, of fining their own members. In the subsequent reign, they were in full possession of the power of taking cognizance of all offences committed by their own members in parliament, which gradually led to the extension of their privileges; so that, in this reign, both houses of parliament had acquired even a greater freedom in the exercise of this power than the crown itself.

Co. 4 Inst. 17
Strype's Memor. iii. 165.
Parl. Hist. iii. 334.
Commons' Journal, Feb. 30, 1549. 21.

2 Hawk. P. C.
Rushw. Col. 456.

The power of the crown to imprison was first called in question in the preceding reign, when Sir John Corbet and others, having been imprisoned by a warrant from the privy council, applied to be bailed; the matter was solemnly debated in the court of King's Bench, and the unanimous opinion of the court was, that they had no right *primâ facie* to demand this benefit without the consent of the council. They therefore remanded them, and in consequence of this proceeding, a provision was inserted in the Petition of Rights in the 3d year of this king, which restricted his prerogative in this particular. By the force of this statute it was held,

that the party accused ought to be bailed upon his *habeas corpus*, unless the crime alleged against him were not expressed with some convenient certainty. On the other hand, as parliament is not restricted by any statute, it is thought not to be under the same control. At this period it was understood, that neither house could imprison a minute beyond the termination of the session; but it appears, that subsequently the Lords have imprisoned for a fixed time.

Perry's Case. Ann. Reg. 1798.

The House of Commons began to take cognizance of matters connected with the returns of parliamentary writs, and the election of their members in the reign of Edward VI., but not before; and in the time of Elizabeth they claimed the right of discussing and adjudging all controversies respecting elections, which had heretofore been determined by the chancellor. Although this point was not conceded to them at that time, the queen having pronounced this a thing impertinent for them to deal withal, yet they appear, in the next reign, to have been in full possession of this privilege.

Commons' Journal, Feb. 1549.

Hallam's Hist. i. 297. D'Ewes, 393, et seq.

Standing army.

In consequence of the abolition of the feudal tenures, a permanent kind of military force was now raised, called a standing army, of which it appears that this king had not more than to the number of 5000.

Grose's Mil. Antiq. 161.

Militia.

The military force, which was necessary for the preservation of the peace, and the internal defence of the country, was now called the militia, and was modelled much in the same manner as it has ever since remained, and not very materially different from what it had been, both before and after the Conquest. The assize in arms, in the reign of Hen. II., required, in imitation of the Saxons, that every freeman should be provided with arms and be capable of using them. This law was not confined to those who held by military tenure, but extended to all citizens and sokemen. In the reign of John this assize was a little altered, and men were compelled to be sworn to it; and in the reign of Henry III. commissioners were assigned to cause men to be sworn and assized to arms. This was followed by the statute of Winton in the reign of Edward I., which contained many additional

Ante, p. 21.

Hargrav. Co. Litt. 95. No. 28.

Rushw. Collect. xv. 655.

articles, and commanded that every man should be sworn to armour according to his goods and chattels. By this statute bows and other armour were appointed for the several classes of subjects, according to their estate and degrees, and constables were commissioned in their several parishes to array and exercise all the commons of the land. In the reign of Edward III. various regulations were made for the encouragement of the use of the bow, the favourite armour of the English; besides which it was enacted, that no man should be compelled to go out of his shire. This was confirmed by a statute in the reign of Henry IV., which very precisely defined the commission of array. The officer, now known by the title of Lord Lieutenant, is first mentioned in a statute of Edward VI., where the commissioner of array is designated by the name of Lieutenant. In this state the ancient militia of the kingdom remained until the reign of James I., when, in consequence of the repeal of the statute of Winchester, it became a question whether the king could, by his prerogative, appoint commissions of lieutenancy for military purposes. To set this question at rest the statute before mentioned was passed in the 12th year of this king.

Stat. 1 Ed. 3. c. 2. Stat 4 Hen. 4. c. 13.

Stat. 2 and 3 Ed. 6. c. 2. Rushw. Collect. pt. iii. 655.

Tenures.

In the statute of this king, which abolished military tenures, tenures in free or common socage, and in frankalmoigne, copyholds, and the honorary services of grand serjeanty, without the slavish part, as the statute observes, are expressly excepted. Socage tenure consisted altogether of a certain service; this of course was now rendered in the shape of rent. Copyhold, the name by which the ancient tenure in villenage was now distinguished, had become divested of all its slavish incidents. Villenage as a condition, had, owing to continual emancipation, altogether disappeared. Sir Thomas Smith, who lived in the time of Edward VI., informs us, that he never knew any villein in gross throughout the realm, and that very few villeins regardant were then existing. In Rymer there is a commission issued by Queen Elizabeth, in 1574, for inquiring into the lands, tenements, and other goods of all her bondmen and bondwomen in the counties of Cornwall, Devonshire,

Copyholds.

Villenage.

Smith's His. of the Commons, l. 3. c. 10.

Barringt. Obs. 278.

Somerset, and Gloucester, such as were by blood in a slavish condition, by being born villeins in any of her manors, and to compound with all or any such bondmen or bondwomen for their manumission and freedom. After this time we hear but little of villeins, whose services were turned into rents payable by money. The last claim of villenage we read of in the records of our courts was made in the 15th Jac. I. By the abolition of military tenures, the law of landed property appears to have become very nearly the same as it was in the time of the Saxons, with such improvements as refinement and civilization naturally produced.

11 State Trials 342.

As the law of real property was so amply treated of under the reign of Edward IV., what remains to be said on this subject may be compressed within a narrow compass. The most important principles of law had since then been developed and established, and the language of law had become definite and fixed. What remains therefore to be said, relates principally to the explanation of such terms as were become current at this period, or soon after, and have been in use ever since.

Remainders and reversions.

Remainders and reversions were a part of the feudal law, and the law of entails, which had survived the feudal system, and were as much discussed as ever. A remainder was now defined to be a residue of an estate in land, depending on a particular estate, and created together with the same. Remainders were said to be either vested or contingent. By a vested or executed remainder, was understood that whereby a present interest passed to some determinate person. A contingent or executory remainder, was the estate in remainder, which was limited to some uncertain person, or depending on some contingent event; as if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail, this was a contingent remainder. Every remainder required that there should be some particular estate, which was said to support the remainder. When such a remainder was the subject of a devise by will and testament, it was called an executory devise. The subject

Co. Inst. 49.

3 Rep. 21.
10 Rep. 85.

Contingent remainders.

Executory devises.

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of contingent remainders and executory devises, became, from the number of new cases and minor points that engaged the attention of the courts, one of the abstrusest branches of legal learning.

Fearn on Contingent Rem. &c.

Co. 22.

A reversion is described by Lord Coke to be the returning of land to the grantor, or his heirs, after the grant was over, which was a piece of old law that may be traced to the Saxons. A reversion was never created, like a remainder, by deed or writing, but arose from construction of law.

Merger.

Plowd. 418. 2 Rep. 60, 61. Cro. Car. 275. 3 Lev. 437.

When a greater and a less estate coincided and met in the same person, the less was then said to be drowned, or merged in the greater; as, if the fee came to tenant for years or life, then the particular estates were merged. We find this term, merge, in Plowden, and afterwards in Lord Coke, and other books. The doctrine of mergers is another branch of legal learning which has occasioned some considerable discussion in our courts.

Title by purchase.

Litt s. 12.

The distinction drawn by Littleton, between title by descent, and title by purchase, was now confirmed by Lord Coke, and subsequent writers. Purchase, *perquisitio*, was defined to be the "possession of lands and tenements which a man hath by his own act and agreement;" which, in fact, comprehended every acquisition of land, except by right of blood; "so that if," says Lord Coke, "I give land freely to another, he is, in the eye of the law, a purchaser."

Inst. 18.

Common assurances.

Shepp. Prac. Couns. 1. Bridgm. Prac. of Convey. 7.

As, by force of the statute in this reign, lands could no longer be transferred by a verbal contract only, deeds of conveyance were now become matters of still greater consideration, and acquired the name of assurances, or common assurances, because they served to assure a man's estate to him. The two principal kinds of assurances were those which were made, by matter of deed, in *pais*, or in the country, that is, with all the notoriety formerly usual, such as feoffments, gifts, grants, leases, bargain and sale, &c. and those by matter of record, as fines, recoveries, and the like. To the account of deeds and conveyances already given, something may now be added.

Ante, p. 89. 375.

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Deeds.

Co Litt. 171.

Co. Litt. 6.

A deed was defined to be a writing, sealed and delivered by the parties. The formal parts of a deed were now, by the wisdom of successive ages, established so as to convey the party's meaning in the clearest, distinctest, and most effectual manner, and were, therefore, become a part of the law: these were, 1. The premises, setting forth the number and names of the parties, with their additions, or titles. 2. The *habendum* and *tenendum*, the former of which, in particular, serves to determine what estate is granted. 3. The *reddendum*, the stipulation or condition. 4. The clause of warranty. 5. The covenants or conventions. 6. The conclusion; containing the execution and date of the deed, and formerly the attestation of the clause *hiis testibus*, for which were afterwards substituted the names of the parties and witnesses, signed by themselves, which is said to have commenced about the time of Edward VI.

2 Comm. 303.

The conveyances entitled to notice here are, uses, fines, and recoveries.

Christian's Notes on 2 Comm. 308.

Uses.

Bax. on Uses, 63. Bro. Feoff. Uses, 30.

After the statute of Uses, in the reign of Henry VIII. it was adjudged, that in conveying to a use, it was not always necessary that the use should be executed the instant the conveyance was made; but the operation of the statute might wait until the use should arise upon some future contingency. This was called a springing or contingent use. Also a use, though executed, might change or shift from one to another; as, if A. made a feoffment to the use of his intended wife and her eldest son, for their lives, upon the marriage, the wife took the whole use in severalty, and on the birth of the son, the use was executed jointly to them both. This was afterwards called a shifting use. Whenever the use limited by the deed expired, or could not vest, it returned or resulted to him who raised it, which was in aftertimes distinguished by the name of a resulting use.

Dyer. 166. 1 Inst. 23.

Powers.

Powel and Sugden on Pow.

In conveying to uses, it has, since the abovementioned statute, become usual for the feoffor to reserve to himself, or to some other person, a power to revoke the uses declared in the feoffment, and to appoint the feoffees to stand seised

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to other uses, which has since been known by the name of powers.

Trusts.

Dyer, 155. Vaugh. 50.

Originally, uses and trusts meant the same thing, and the words use and trust are both mentioned in the statute of Uses, so often referred to; but as the courts of law very soon after determined that there were uses, to which the statute did not execute the possession, they would take no cognizance of them, and accordingly they were taken up by the Chancery under the name of trusts; but with such qualifications, as to do away with the objectionable features of uses; the trustee being considered merely as the instrument of the conveyance.

Fines.

West's Symb. tit. Fines. Finch. Law. 278. Ante, p.171. 5 Rep. 39. 2 Inst. 511.

A fine was now admitted, without dispute, as a bar to an estate in tail, by force of the statute in the reign of Henry VIII. To the levying of a fine belonged five things, namely, 1. The original writ, for the most part a writ of covenant, sometimes a writ of *mesne*, for which a fine was paid, called the primer fine. 2. The *licentia concordandi*, for which another fine was paid, according to the ancient prerogative of the crown, called the king's silver, or the post fine, to distinguish it from the primer fine. 3. The concord, or agreement itself. 4. The note of the fine, *nota finis*, which was the brief or abstract made by the chirographer. 5. The foot of the fine, which contained the conclusion or effect of the fine.

West, ubi supra.

A fine might, in the language of former times, be either a fine, *sur cognisance de droit, come ceo que il ad de son done*, which was a fine upon acknowledgment of the right of the cognisee; a fine, *sur cognisance de droit tantum*, or upon acknowledgment of the right merely; a *fine sur concessit*, where the cognisor granted to the cognisee an estate *de novo;* and a fine *sur done, grant et render*, which comprehended the fine *sur cognisance de droit come ceo*, and the fine *sur concessit*. A fine, particularly the first kind, was a solemn conveyance, which bound parties, privies, and strangers. The parties were the cognisors and cognisees; the privies were the heirs general of the cognisor, the issue in tail, and

others, who must make title by the persons who levied the fine; strangers were all other persons in the world except parties and privies.

Common recoveries.

After recoveries had been admitted to bar an entail, they were employed as a common assurance; but retained all the forms of a regular proceeding, in which there were three persons, namely, the demandant, tenant, and vouchee. The demandant was he that brought the writ of *præcipe quod reddat*, who was the recoveror; the tenant was he against whom the writ was brought, who was termed the recoveree, or the party suffering the recovery; and the vouchee, he whom the tenant vouched, or called to warranty, for the land in demand. A recovery, with a double voucher, was where the tenant vouched one who vouched another, called the common vouchee, from his frequently being so vouched; and a recovery with treble voucher, was where three were vouched.

West. Symb. tit. Recoveries. New Book of Entries, tit. Recovery. Pigott on Recov. 17.

The jurisdiction of courts was now so defined and settled as to obviate the principal causes of dissatisfaction that had heretofore existed.

Judicature of the council.

The judicature of the council was much abridged by the statutes in the preceding reign, by force of which it might not take cognizance of any matters that could be determined in the common-law courts. As to offences against government, its jurisdiction was now only to inquire, and not to punish; so that a party committed by order of council might have an *habeas corpus* the same as if committed by a common magistrate. But the council still took cognizance of all matters respecting lunacy and idiotcy; as also of all appeal causes from the colonies, and other parts out of the jurisdiction of this kingdom. Appeals likewise lay from the isles of Jersey, Guernsey, Sark, Alderney, and their appendages, only to the king in council, and never by writ of error to the King's Bench, because the courts in those islands did not proceed by the same laws as our courts at Westminster. Besides, these islands were not originally

2 Hawk. P. C. c. 15.

Hale Hist. c. 9. Jenk. 194. P. C. Lo. 7 Rep. 21.

parcel of the realm of England, but parcel of the dominion of the crown of England.

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Judicature of parliament.

The judicature in parliament was now so modified as to adapt it to the state of all the other branches of judicature. The Lords, as before observed, took an active part in judicial proceedings at an early period, of which the rolls of parliament furnish ample testimony, from the reign of Edward II. In these rolls we read of numerous civil suits determined in parliament, between subject and subject, which in after times were considered as more fitted for the cognizance of the courts at Westminster. But still the practice of referring matters in the first instance to the adjudication of parliament, without obtaining the judgment of an inferior court, did not altogether cease; for we find that in this reign, in the well-known case of Skinner *v.* The East India Company, the Lords claimed an original jurisdiction, on the ground of ancient usage, in cases where the ordinary courts did not furnish a remedy. The Commons, denying this assumption, powerfully and successfully resisted the claim, which has never since been revived.

Jurisd. of House of Peers asserted, 27, et seq. Harg. Pref. to Hale's Juris. of House of Lords.

But the appellate jurisdiction of the upper house, which rested on different grounds, was now confirmed, notwithstanding the Commons showed a disposition to call this also in question.

Reeves' His. ii. 411.

Ante, p. 250.

The control exercised by parliament over the courts of law in former times is a striking feature in the history of our jurisprudence. A committee of parliament was, as before shown, appointed, in the reign of Edward III., for the prevention of delays in the inferior courts, in consequence of which, parties, who felt themselves aggrieved by such delays, petitioned the king and council, that a writ might issue out of Chancery, directed to the justices, to cause the record of the plea to be brought before parliament. Also for reversing erroneous judgments in the Exchequer, a writ was given by another statute in the same reign.

Ante, p. 263.

Cott. Abrid. 30.

But not only by the petition of the party were suits

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depending in the courts below brought before parliament, but also the judges themselves made it a practice to take the advice of parliament, and, as it should seem, in obedience to an express command. "We were commanded," says Thorpe, "by the council, that in case of any doubt, we should not go to judgment without good advice." Therefore he recommended them to refer to parliament, adding, "as they will have us do, so we will, and not otherwise." This slavish dependence on the part of those who ought to have been the interpreters of the law, was superseded by the more becoming practice of all the judges repairing to the Exchequer Chamber, in order to deliberate on any cases of doubt or difficulty; since which period they have been usually consulted by the Lords in all points of law. But, in regard to writs of error at the suit of the party, they have, of course, continued to be brought since that period.

40 Ed 3. 31·
39 Ed. 3. 35·

37 Hen. 6. 12.

The practice of appealing from the decree of the chancellor to the House of Lords was not regularly introduced until this period, when we read of appeals; for by this name this proceeding, in regard to Chancery, was distinguished. The practice appears to have had its regular commencement in the reign of King James, when the maladministration of the Lord Chancellor Bacon called for the animadversion of parliament.

Williams's Jus. Appell. 54, et seq.

Although the attempt, on the part of the Commons, in the reign of Henry IV., to have a share in the judicial proceedings of parliament was not successful, yet we find that, in the reign of Edward IV., they had a voice in bills of attainder, as they had subsequently in bills of pains and penalties; besides which, their power of impeaching was considerably enlarged by a statute, which prevented the king's pardon from being pleaded in bar of an impeachment. It was also determined, in the case of Warren Hastings, that an impeachment should not be abated by a dissolution.

Stat. 12 & 13 W. 3. c. 2.

Jurisdiction of the court of Chancery.

The jurisdiction of the Chancery, which had long occasioned much question and dispute, was finally established in the reign of King James, in consequence of proceedings

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Parl. Hist. ii. 390. 1 Chanc. Rep. App. 26.

which were set on foot by Sir Edward Coke, then chief justice of the King's Bench. The point at issue at that time was, whether a court of equity could give relief after, or against a judgment at common law. The case which called for the interposition of Chancery was one in which it was fully justified, if ever, in interposing its authority. A judgment having been fraudulently obtained in the King's Bench, the injured party applied to Chancery, and obtained relief; upon which the court of King's Bench proceeded so far, as that indictments were preferred against the suitors, the counsel, and even a master in Chancery, for incurring a *præmunire*. The question being brought before the king, he referred it to the law officers of the crown, whose report was in favour of the court of equity. This report was confirmed by the king with this declaration, "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts, touching their jurisdictions, and the same to settle and determine, as we, in our princely wisdom, shall find to stand most with our honour," &c. This event happened during the chancellorship of Lord Ellesmere.

After this period, the courts of equity and law acted more in concert, each co-operating in its way for the furtherance of the grand object, namely, the administration of justice. The post of Chancellor having since been filled by men of the most distinguished talents, they have reduced their proceedings to a system, and raised this court very materially in public consideration. It is very evident that the court of Chancery was, at all times, well suited to the wants of the people. The Commons were, at an early period, well satisfied with this court, so long as it kept within its jurisdiction, in aid or correction of the common law, and not in opposition to it. In the last reign, when all other extraordinary jurisdictions were, in compliance with popular feeling, abolished, not a single voice was raised against the Chancery. As a further confirmation of this opinion, it may be added that the influx

Ante, p. 325.

of business in this court was always greater than what could conveniently be despatched by the judge presiding there. What the increase of business was in the time of King James, may be inferred from this circumstance, mentioned by Mr. Barrington, on the authority of Sir Edward Coke, that, in the time of Henry VI., no more than 400 subpœnas issued, one year with another, out of the court of Chancery; and that, in the time of James I., the number was not less than 36,000.

Barringt. on stat. 15 Hen. 6.

This court had, as before observed, an ordinary and an extraordinary jurisdiction. By its ordinary, or common-law jurisdiction, it had power to hold pleas of *scire facias*, for the repeal of the king's letters patent, writs of partition, recognizances acknowledged in Chancery, and also of all personal actions by or against any officer of the court; besides the power which it has at different periods received by acts of Parliament to take cognizance of different offences and causes. All original writs, commissions of bankrupt, of charitable uses, idiotcy, lunacy, and other commissions, issue out of Chancery, for which it is always open. An *habeas corpus* and prohibition may be had from this court in vacation; as also a subpœna to compel witnesses to appear in other courts, when they have no power to call them.

Ante, p. 401.

1 Co. 4 Inst. 79. 1 Danv. Abr. 776.

As this court never adopted the trial by jury, it never tried any issues on the common-law side, but the lord chancellor or lord keeper used to deliver the record *propria manu* into the court of King's Bench, there to be tried. From this court a writ of error lay into the King's Bench, but as the legal business of Chancery declined, these writs of error became of rare occurrence. The last on record is said to have been brought in the reign of Elizabeth. So little was this writ known or remembered in the reign of this king, that Lord Keeper Guildford is said to have maintained that no such writ lay.

Co. 4 Inst. 79. 18 Ed. 3. 35. 17. Ass. Dyer, 315. Leg. Jud. Chanc. Hist. of Chanc. 3 Com. 48 1 Eq. Cas. Ab. 129. 1 Vent. 131.

The equitable jurisdiction of this court, although probably of later date, was of incomparably greater importance. It was now admitted, without dispute, to extend to all mat-

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ters of covin, accident, and breach of confidence; to covin, that is to say, to all frauds and deceit for which there was no remedy, or not so efficient a one at law; to accident, as when a servant, an obligor, or a mortgagor, was sent on a certain day to pay a sum of money and was robbed; to breach of confidence, which, on the introduction of uses, was the principal business of this court, and at the period we are now treating of, as well as hereafter, formed a considerable branch of the Chancery business under the name of Trusts.

Co. 4 Inst. 1 Eq. Ab. 1 Vern. 205. 2 Vern. 200.

The manner of conducting a suit in equity was, in many particulars, different from that of a suit at law. It was commenced by a bill, couched in the style of a petition, because it was at first addressed immediately to the king in Chancery. This bill answered to the declaration in the common-law courts, and was called an English bill, to distinguish it from the proceeding on the common-law side, which was in Latin. The bill was followed by the process of subpœna before mentioned; and in the case of a peer, first by a letter missive, written by the lord chancellor or lord keeper, and afterwards, if this was not attended to, by the writ of subpœna. If the defendant did not appear, or disobeyed any of the orders of the court, he was said to be in contempt, on which issued a writ of attachment in the nature of a *capias*; and if the sheriff returned a *non inventus*, there was awarded successively, a writ of attachment with proclamation, and a commission of rebellion, and lastly a serjeant was sent out to take the defendant.

Co. 4 Inst. 82.

Ante, p. 402. West. Sym pt. ii. 177. Ante, 402. West. Sym. ii. 183.

West. Sym. ii. 181.

Crompt. Jur. de Starre Chamber.

When this process failed, in compelling the appearance of the defendant, it was held at one time, that the chancellor could go no further, for that he could only bind the person and not the land. Such at least appears to have been the opinion of the common-law courts for a long time, which made it a matter of difficulty for the chancellor to enforce his decrees. To remedy this inconvenience it is said, that Sir Nicholas Bacon, who was lord keeper in the reign of Queen Elizabeth, introduced the practice of sequestration,

1 Eq. Ab. 130. Co. 4 Inst. 84. 1 Rol. 86 3 Bulst. 34. Beames's Ord. in Chanc. 16. Toth. Proceed 37. Gilb For. Roman. 84.

so far at least as to sequester the thing in demand; and after the power of this court was established, it became usual to seize by sequestration all the defendant's personal effects, and the profits of his real estates, and to detain them subject to the order of the court.

CHARL. II. Eq Ab. ubi supra.

Another peculiarity in the proceedings of this court was the bill of discovery, by which a party was compelled on oath to discover all matters within his knowledge, which, though concealed, was binding in conscience. Of this bill the first mention appears to have been made in this reign.

Eq. Ab. ubi supra.

The mode of trial in this court was, according to the course of the civil law, by means of interrogatories administered to witnesses, whose depositions were taken down in writing. The court was also armed with powers for procuring evidence which are unknown to the common-law courts.

If, in the course of a suit, any new matter arose which did not exist before, the plaintiff might set it forth in a supplementary bill; and when the suit was abated by the death of any of the parties, it might be renewed by a bill of revivor; also a bill of review might be had, where error appeared on the face of the decree, or by special leave of the court, upon oath made of the discovery of new matters or fresh evidence. Appeals from the Chancery were made by petition to parliament, and not by writs of error, as upon judgments at common law.

Beames's Ord. in Chanc. 1.

The judgments of this court were, in the royal style, denominated decrees, which might be either final or interlocutory.

The officers of this court derived their names and office from the original common-law business of framing and sealing writs. They were all designated by the general name of *clericus*, clerk, because the whole business of Chancery was in the hands of the clergy. There were different ranks and degrees of these clerks, according to the part which they took in making out the writs, as the *clerici de primâ formâ*, or *de primo gradu*, whom Fleta calls *collaterales et socii*

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Cancellarii, who assisted the chancellor in the framing of writs in *consimili casu*, on the stat. Westm. 2. 13 Ed. I. These were likewise called at that time *præceptores*, and since commonly masters, of which the master of the rolls was the chief. Under these were the *clerici de secundâ formâ*, or clerks of the course, as they are called in the statute of Westminster, from thence afterwards called *cursitores*, cursitors; their business was to make out the common writs, which from them were called *brevia de cursu*, to distinguish them from the *brevia magistralia*, which were framed by the masters. To these masters was probably first applied the name of counsellor, which has since been indiscriminately used for all barristers. They were so denominated, because they were of the council of the chancellor and acted as his assistants. In the reign of King James I. it was determined, that the eleven masters should have precedence of serjeants.

Ante, 176.

Hist. of Chanc. 34. Ibid. 42.

When the Chancery became a regular court of equity, it was the proper business of the masters to examine and report as to the sufficiency of answers and examinations, the pertinency and scandal of bills and depositions, &c. and the taking of accounts, &c.; after which it became the practice to refer pleas and demurrers to them, and the chancellor made his decree on their report; but these delegations and references to the masters were restricted in the reign of King James, when the masters were no longer allowed to hear and determine, but only to report, as we learn from the speech of Sir Francis Bacon to the court in 1611.

Leg. Jud. Chanc. 79, et seq.

Leg. Jud. Chanc. 91.

What share the master of the rolls had in the equitable jurisdiction of the Chancery, was for some time a disputed question. He seems to have sat in the place of the chancellor during his absence beyond sea, as early as the reign of Edward I., when a privy seal was ordered to be made out to deliver the king's great seal into the clerk of the rolls's hands, charging him to occupy it in the execution of all things of right and course of conscience until the chancellor's return. In subsequent reigns there are similar

Hist. of Chanc. 66.

examples, where the master of the rolls was intrusted with the seal for the purpose of sealing writs; but it appears, that in some of these cases the other masters were also employed with him in the keeping of the seal. Besides, they had commission to act in matters, according to the form of the common law, in the absence of the chancellor, but the custody of the seal is supposed not to have conferred upon the commission any of the judicial power of the chancellor to hear and determine causes in Chancery. Nor are there any traces of an equitable jurisdiction exercised by the master of the rolls, except as an assistant to the chancellor, before the reign of Henry VIII., when the commission before mentioned was given to the master of the rolls, which, though pronounced by Lord Coke to be unlawful, yet served as the groundwork of future commissions to the master of the rolls, as in the subsequent reign, when Lord Southampton gave a commission to Sir Richard Southwell, master of the rolls, and other masters in Chancery, to hear and determine all causes in his absence, with a proviso, that all decrees should be presented to the chancellor to be signed before they were enrolled.

Hist. of Chanc. 68.

Hist. of Chanc. 78. Ante. p 166. Co. 4 Inst. Hist. of Chanc. 85.

Ibid. 86.

During the vacancy of the seal after Sir Christopher Hatton's death, a commission was given to the lord treasurer and others of the privy council for the custody of the seal, and also a commission to Sir Gilbert Gerrard, master of the rolls and other masters, for hearing and determining causes in Chancery. Owing to the increase of business, this commission was enlarged and became a general commission; likewise, in process of time, the names of the other masters were sometimes omitted in the commission which had been heretofore inserted, which gave rise to the practice of the master of the rolls making decrees alone. In the time of this king Lord Keeper North decided, that the master of the rolls could not, by his commission, make a decree without the assistance of two masters; nevertheless we find, that subsequently the master of the rolls did make decrees alone, and that they were drawn up with the style of the master of the

Stow. 761. Leg. Jud. Chanc. 113.

Hist. of Chanc. 87.

Hist. of Chanc. 98. 1 Vern. Leg. Jud. Chanc. 183.

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rolls only, at the top of the margin of such decree. To set this question at rest, respecting the jurisdiction of the master of the rolls, it was declared by a statute in the reign of Geo. II., that all orders and decrees by him made, except such as, by the course of the court, were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or allowed by the lord chancellor, and not to be enrolled until they were signed by his lordship. The master of the rolls is styled in his patent "clericus parvæ bagæ, custos rotulorum," &c. He is called clerk of the rolls, in the statute of Richard II., and also by Fortescue; but in the stat. 11 Hen. VII. c. 18, he is styled master of the rolls.

Stat. 3. Geo. 2. c. 30.

Stat. 12 Ric. 2. c. 2. Fort. de Laud. Leg. Angl. c. 24.

Besides the masters in ordinary, there were also masters extraordinary, of whom mention is made in an order in Chancery by Sir Christopher Hatton. By this order, masters extraordinary were restricted from doing any thing belonging to a master in Chancery, within three miles of London and the suburbs; which, by a subsequent order in Lord Clarendon's time, was extended to the distance of twenty miles from London. Their principal business was, and is, to take affidavits.

Beames's Order in Chanc. 48.

Ibid. 212.

King's Bench.

The court of King's Bench received considerable accessions to its criminal jurisdiction, by the abolition of the Star Chamber; after which it became the supreme criminal court of the kingdom, the *Custos Morum*. The justices of this court are the sovereign judges of gaol-delivery, and of oyer and terminer; also conservators of the peace throughout the whole realm, and supreme coroners of all England. Its jurisdiction was so high and transcendent, that it suspended the powers of all justices of oyer, terminer, gaol-delivery, and of eyre, in the county wherein it sat, during the time of its sitting, so that all proceedings commenced before any such justices, during such time ceased. It likewise kept all inferior jurisdictions within their proper bounds, and indictments from all inferior courts might be removed thither, as before observed, by *certiorari*, and tried either at bar or at Nisi

1 Sid. 168. 9 Co. 118.

4 Inst. 73.

Ante, p. 105.

Prius. Although this court usually sat at Westminster, yet it had not lost its ambulatory property, but might remove with the king wherever he thought proper, as happened in this reign, when it removed to Oxford, on account of the sickness in 1665

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All criminal pleas were heard in this court, on what was called the crown side or the crown-office, to distinguish it from the plea-side, where all civil pleas were heard. This court had an original jurisdiction and cognizance of all actions of trespass, or other injuries, alleged to be committed *vi et armis*, as also actions for forgery of deeds, maintenance, and the like, for which, though criminal in their nature, the action was brought for a civil remedy. Of this description were also the actions for adultery and seduction, which, soon after this period, began to be brought in this court, in consequence of the jurisdiction of the ecclesiastical courts having become too feeble to afford relief to the suitors by the punishment of the offenders, as had heretofore been the case.

Finch. L. 310. Show. 109. F. N. B. 86. 92 Lib. Pract. Reg.

Of the accessions which the court of King's Bench gained to its civil business, by the surmise that the party was in the custody of the marshal, has already been stated; but it appears that a statute in this reign, which required that the true cause of action should be expressed in the body of the writ or process, by which a party was held to bail, would have ousted the King's Bench of all its jurisdiction over injuries without force, if the officers of that court had not added to the usual complaint of trespass, a clause with an *ac etiam*, that is, the defendant was required to answer the plaintiff of a plea of trespass, and also to a bill of debt. Besides this original jurisdiction, this court took cognizance of civil suits, when removed by writ of error from the Common Pleas, as also from the court of King's Bench in Ireland; but this latter part of their jurisdiction has been since abridged by statute.

Ante, p.403. Stat. 13 Car. 2. st. 2. c. 2. 3 Comm. 287. Trye's Jus. Fil. Sul. Lect. 300, et seq.

Stat. 23 Geo. 3. c.28.

Common Pleas.

Although all civil actions between subject and subject, which concerned the right of freehold, or the realty, and also all personal actions, were the proper object of the juris-

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diction of the court of Common Pleas, yet, as the court of King's Bench had, in most of them, indirectly a concurrent jurisdiction, the latter had the advantage over the Common Pleas, whose originals were fineable, and the process not so expeditious. On this account the King's Bench carried away so much of the business of the Common Pleas, that the latter are said to have procured the abovementioned statute to be passed, with a view of stopping the career of the King's Bench. When they found themselves foiled in this attempt, they also had recourse to the same expedient, of inserting the clause *ac etiam billæ*, &c. in their writs of *clausum fregit*, upon which a *capias* lay. This practice is said to have been introduced by Lord Guildford, when he presided over the Common Pleas.

North's Life of Lord Guildford, 99. Ibid. 100.

Court of Chivalry. Co. 4 Inst. 123.

The court of the Constable and Marshal, or the Court of Chivalry, as it was now called, although not expressly abolished, had fallen almost entirely into disuse. When the office of constable ceased to be hereditary, there seemed to be no disposition to revive the appointment, for neither the jurisdiction of the court, nor the proceedings therein, were much favoured in law. When chief justice Fineux was asked by Henry VIII. what was the power of the constable, he declined answering, and alleged as his reason, that it belonged properly to the law of arms, and not to the common law. It was probably this feeling that led to the statutes before mentioned in that king's reign, that furnished a means of bringing offenders to justice in the ordinary course of law, for crimes committed out of the realm.

Dyer, 285. Ante, p. 457.

After the post of high constable ceased to be hereditary, the earl marshal continued to hold his court without the constable, during the reigns of Henry VIII., Elizabeth, and James I., with the concurrence of the common-law judges; but in the preceding reign it was strongly insisted on, and became at length an established doctrine, that the earl marshal should not hold this court in appeals of a capital nature.

Rushw. Coll. 1055. 1456. Dr. Aldes' Case. Parl. Cas. 64. 66. 4 Inst. 126.

As to the civil business of this court, that had, owing to

Salk. 553.

the feebleness of the jurisdiction, fallen almost entirely away, as the court had no power to enforce its judgments either by fine or imprisonment.

CHARL. II. Hale's Hist. Com. Law, c. 2.

The court of the Constable and Marshal being restricted from intermeddling with any thing determinable by the common law, they could not, even in suits that lay within their jurisdiction, give damages against the party convicted before them, and at most could order reparation in point of honour; neither could they, as to the point of reparation in honour, hold any plea of words or things, wherein the party was relievable by the courts of common law.

Ante, p. 277.

We have seen that in matters of contracts made in foreign parts, the courts at Westminster had adopted a device, in order to draw such causes to themselves.

The office of earl marshal, which still exists, and is hereditary in the family of the Duke of Norfolk, has, since that period, been confined to the adjusting armorial ensigns, determining the rights of place and precedence, marshalling and conducting coronations, marriages and funerals of the royal family, and proclaiming war and peace.

Courts martial. Grose's Mil. Antiq. ii. 59.

The administration of military justice was, as before observed, committed to the constable and marshal, who presided as judges, assisted by some civilians, who tried and punished all offences, according to the laws and ordinances then in force. Sometimes military offences of great magnitude, or committed by persons of great rank, were tried and determined in parliament, of which there are examples in the reign of Henry II. and his successors. When the court of the Constable and Marshal declined, commissions was granted to the commanders, who were entitled Lieutenant-Generals, and if peers Lord Lieutenants, which contained a clause, authorizing them to enact ordinances for the government of the army under their command, and to sit in judgment themselves, or appoint deputies for that purpose, who constituted what was then called a council of war, wherein officers, not below the rank of a count or colonel, had a right

Speed. 502 Hollingsh. and Stowe's Ann. 2 Hen. 2.

Grose. 60

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to sit as assessors. The presiding officer was styled President of the High Court of War.

Grose, 61.
Rym. Foed. 1626.

Towards the latter end of king James's reign, and the beginning of that of his successor Charles I., commissions of this kind were very frequent, wherein it was directed that all controversies between soldiers and their captains, and all others, were to be tried in a council of war.

Grose, ubi supra.

At what precise period courts martial, according to their present form, were introduced, it is not easy to ascertain. They are mentioned in the ordinances of war of king James II. A.D. 1686, with the distinction of general and special courts martial. After the revolution, the form and powers of courts martial were defined by an act of parliament, called the Mutiny Act, which, though temporary, has been renewed every year.

Marshalsea, and Court of the Palace.
Co. 4 Inst. 130.

The ancient court of the Steward and Marshal was now known by the name of the Marshalsea; the jurisdiction of which appears to have remained unaltered. But another court was erected by letters patent in the preceding reign, called the *Curia Palatii*, or Court of the Palace, which had power to try all personal actions, as debt, trespass, and the like, between party and party; the liberty whereof extended twelve miles round Whitehall, which court has survived to the present period, notwithstanding its legality has been called in question.

Among the new actions entitled to notice at this period, that of libel claims the first consideration.

Libel.
Jones' Law of Libel, 1.
Jones, ubi supra.

Libel, in Latin *libellus*, a little book, was employed by the Romans to denote any declaration or indictment delivered by an accuser to the pretor, in open court, whence it is used in a similar sense in our ecclesiastical courts. *Libelli* also denoted the written messages of the emperors and great men, painted exhibitions, and memoranda of malignant pasquinades on the characters of individuals; in which latter sense it was also called in the law of the Twelve Tables, *carmen famosum*, and was pronounced a capital offence; but the

rigour of this law was mitigated in aftertimes, and the punishment reduced to exile, fine, or *legem talionis*, that is, the infliction on the libeller of the same punishment as would have been inflicted on the party libelled, if found guilty of the things laid to his charge. Of this species of personal injury there were naturally but few examples in the early period of our history, when the art of writing was but little cultivated; yet we learn from Bracton that it formed a part of our jurisprudence in his time, and was reckoned by him among the *placita coronæ:* "Fit autem injuria non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus cæsus, verum cum ei convitium dictum fuerit, vel de eo factum carmen famosum." How closely this corresponds with the imperial law may be gathered from the words of Justinian, "Injuria autem committitur non solum cum quis pugno pulsatus aut fustibus cæsus, vel etiam, verberatus erit sed, &c. &c. vel si quis ad infamiam alicujus libellum aut carmen, aut historiam scripserit, composuerit, ediderit, dolore malo fecerit, quo quid eorum fierit." Although Bracton's description of the offence is evidently taken from Justinian, yet there is no doubt but that this point of law had been adopted by us; for Lord Coke cites, from records in the reign of Edward III., two cases of libellous letters, written and sent, where the parties were indicted in the King's Bench, and found guilty; in the latter of the two cases, the defendant was sentenced to be committed to the custody of the marshal, and to find six securities for his good behaviour. Before the introduction of printing, injuries affecting the good name of persons, or the public peace, were, for the most part, committed by means of words spoken, of which, as before observed, both the common and the statute law furnished remedies. The spiritual courts took cognizance of defamation in common cases, unless any temporal damage ensued which would support an action with a *per quod*, that is, by which the plaintiff could show some special loss occasioned by the words used. Actions of slander were usual in the cases of common persons, besides which, there

Bract. fol.

Inst. l. 4. tit. 4. de Injuriis.

Co. 3 Inst. 174.

Ante, p. 39. 306.

Finch. L. 185.

is also frequent mention of the action called *scandalum magnatum*, founded on the stat. Westm. 1 Ed. I. and stat. 2 and 12 Ric. II. where words were spoken in derogation of a peer, a judge, or other great officer of the realm, which differed from other actions of slander, as it was guided by no such fixed rule, but was altogether at the discretion of the court to determine what was derogatory to the high character of the person of whom it was spoken; for what would not be actionable in a common case, might, in the other case, be looked upon as a grievous injury.

5 Co. De Libellis famosis. Barringt. Obs. on stat 83.

When, by the invention of printing, a more formidable means of injuring individuals, and disturbing the public peace, might be employed, the law of libel became more nicely defined. The first adjudication of this kind was given in the case of L. P., in the Star Chamber, E. T. 3 Jac. I. The libel condemned was a satirical ballad upon an archbishop, who was then dead, and likewise his successor, on which occasion the following points were resolved: 1. That a libel against a magistrate deserved a severer punishment than one against a private man; this was in conformity with the common law. 2. That though the person libelled was dead at the time of the making this libel, yet it was punishable. 3. That a libellor, called *famosus defamator*, might be punished by fine or imprisonment; and, if the case were exorbitant, by the loss of ears. 4. It was not material whether a libel was true or false, nor whether the party libelled were of good or ill fame, which was agreeable to the civil law. 5. If one finds a libel composed against a private man, the finder may either burn it, or presently deliver it to a magistrate; but if the libel concern a magistrate, or other public person, he ought presently to deliver it to a magistrate, which is also agreeable to the rule of the civil law. 6. A libel might be *in scriptis aut sine scriptis*. 1, *In scriptis verbis et cantilenis*: 2 *Traditione*: 3, *Sine scriptis, i. e. signis*, &c.; as by drawing a picture, or raising a gallows before a man's door.

Theodos. Cod. 9. tit. 34. Hob. 252. Co. ubi supra. Jones' Law of Lib. 3.

Co. ubi supra.

Ejectment.

When the writ of *ejectione firmæ* came to be regularly employed as a method of trying titles to land, the action was

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designated by the name of ejectment. In such cases it became the practice for the party interested in trying the title to seal a lease to some third person or lessee, which indicated the right of possession or entry. The lessee then continued in possession until he was ousted by some person appointed for this purpose, called the casual ejector. To avoid the formalities of making an actual lease, entry, and ouster, it began about this period to be the practice of supposing all these things to be done for the bare purpose of trying the title.

Runnington's edition of Gilbert on Ejectment, 167. 176.

Trover.

The substitute for the action of detinue, which was first mentioned in the reign of Henry VIII., became very soon after familiarly known by the name of an *action sur trover et conversion*, that is, an action of trover; because the demand was grounded upon the supposed trover, or finding by the defendant, of the thing demanded, and converting it to his own use. This action being found to have advantages over that of detinue, it was extended to many more cases at this period than it had been heretofore. The fact of finding was held to be immaterial, provided there was evidence of a conversion; and the bare refusal to deliver a thing up on demand, was held to be sufficient evidence.

Ante. p 468. Reeves' His. iv. 385.

10 Rep 56. 491. Sid. 264. 3 Salk. 365.

Assumpsit.

The action of *assumpsit* was now become so general, that it almost superseded the action of debt, which was principally confined to debts upon specialty, or for rent upon lease. In former times it was doubted whether this action would lie on a promise made to a wife, but it was decided in the affirmative, in the reign of Henry VIII.; it was not, however, decided until the reign of Philip and Mary, that an *assumpsit* should lie against executors. These two last actions have been more especially preferred, because no law wager is admitted in them.

Sheppard's Epitome, 48.

27 Hen. 8. 24. 14 Hen. 8. Co. Inst. 291. Plowd. 180.

Proceedings in a suit.

The proceedings in courts were now reduced to great form and order, nearly the same as they have ever since continued; and the language of the law was so settled, that, with the exception of some few additional terms, it has

undergone no change. There are examples extant, even from the time of Henry VI., of the orders and rules by which the business of the court was regulated. These, while they were merely verbal, were afterwards known by the general name of orders, to distinguish them from rules, which were the orders drawn out in form; so, likewise, the application of counsel during the progress of a suit, was designated by the name of motion.

Wynne's Eunom. Dial. ii. s. 26.

In proportion as the courts grew more methodical in their proceedings, so were they enabled, from time to time, to make such alterations in their orders, as tended to improve the administration of justice. In this reign they made a revisal of their orders, for the purpose of abridging the process, and doing away with many superfluous formalities, that were burdensome to the suitor, such as the old forms of attachment and *distringas*, special originals, making out and filing originals, and a number of other matters of a like nature.

Boote's Hist. of a Suit at Law, Pref.

Ibid. 17, et seq.

The different ways of commencing a suit in the different courts, though grounded on the practices of old times, yet were not then so nicely defined as they had been since. The King's Bench and Common Pleas usually commenced an action by an original writ, simply called an original, except when it was at the suit of attornies, or officers of the court, when it was begun by attachment of privilege, or when it was against officers of the court, and was begun by bill. Besides, it was now very usual for the King's Bench to commence suits by a peculiar process, called, from the county where the court usually sat, a bill of Middlesex; or, when it sat in Oxfordshire, a bill of Oxford. The Common Pleas likewise was also in the practice of commencing suits by a *capias quare clausum fregit*, founded on a supposed original, for this court could not originally commence any suit without an original (except in the case of its own officer), for it was the original which gave it jurisdiction. But partly to avoid the fines which, according to the old

3 Comm. 283, et seq.

Trye's Jus. Filaz. 98. 101.

Gilb. Hist. C. P. 3.

Boote's Hist. of a Suit at Law, 50.

law, were paid on originals, and partly to bring it nearer on a level with that of the King's Bench, it had adopted this mode of commencing a suit.

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The proceedings in the Court of Exchequer were commenced mostly by subpœna, as in the Chancery, except at the suit of its officers, when they were begun by a *capias* of privilege, or against its officers, when they were begun by bill; or, in the case of persons having privilege of parliament, when they were begun by *venire facias ad respondendum*. The writ *quo minus*, which properly lay for the king's debtor, was, by a fiction of law, employed so as to enable this court to hold common pleas, contrary to the intention of the statutes made on this subject.

Wynne's Eunom. Dial. ii.

Before oral pleadings went altogether out of practice, the prothonotaries, or officers of the respective courts, took down all the acts from the return of the writ: thus in all actions where the first process was by summons, they took notice of the summons, and said "C. D. summonitus fuit;" and when the process was by attachment, they said "C. D. attachiatus fuit ad respondendum;" and so on throughout, a practice which was derived from the days of Bracton. For this purpose they had different rolls, as the Imparlance Roll, and the Plea Roll, &c. from which the Nisi Prius Roll was transcribed. As the business of the courts increased, and attornies began to grow expert in practice, they used to bring their pleadings drawn upon paper, which might be entered as occasion served. At what precise period oral pleadings ceased is not known, but we know that paper pleadings were established in the time of Sir Matthew Hale, who complains of them, on account of their having occasioned the pleadings to be so prodigiously long: a complaint which has ever since been loudly expressed.

Boote's Hist. 78.

Bract. 365.

Boote, ubi supra.

Hale's Hist. Com. Law, c. 8.

Boote, ubi supra.

After the practice of paper pleadings was regularly established, appearance was not made in person, but by a short note of the attorney, which was entered with the filacer of the county where the action was brought, and was now or very soon after, called entering appearance. So, likewise,

Boote's Hist. 71.

Ante p. 207, 208.

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when profert of a deed was made, instead of producing the deed in court, it became usual for the attorney by whom the oyer was demanded, to call on the party, and desire him to bring the deed, and give a copy of it if required.

Boote's Hist. 90.

Modes of trial.

The modes of trial which were partially in use at this time, were the trial by record, by certificate, by inspection or examination, by witnesses, by battle, by law wager, and by jury, all of which, except that by inspection, have been already explained. The trial by record had now acquired such importance, that whenever an issue of this kind happened, it was the only legitimate means of ascertaining the truth. A record, observes Lord Coke, is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise; but only by itself. The trial by certificate of the bishop had, for reasons already pointed out, fallen considerably into disuse; but it was, and still is, applicable to the issue of *ne unques accouple en loial matrimonie*, and in other cases not of an ecclesiastical nature. Of the trial by inspection, or examination, I have met with no mention in our early writers by that name; it was perfectly in conformity with the ancient modes of proceeding. This species of trial was resorted to in cases where the matter in question was an object of the senses, by the help of which the judges might form their own conclusion, as in an issue upon the infancy, the court would decide by an inspection of the party, whether he was of full age or not; which case, however, it is worthy of remark, was, in Glanville's time, decided by a jury of eight. The trial by witnesses, so much in use in former times, was now confined, in the opinion of Finch, to the single case of an issue in a writ of dower, where the tenant pleaded that the husband was dead; this might, for the sake of expedition, be tried by witnesses, examined before the judges. Lord Coke says, it might also be used to try whether the tenant in a real action had been summoned, and in some other cases. The trial by battle, which had

Ante, p.120. 1 Inst. 117. Ante, p.204. Co. Litt. 74. 9 Rep. 31. Ante, p.119. Finch's Law. 423. 1 Inst. 6. 3 Comm. 336. Ante, p. 47.

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existed by sufferance for so many centuries, was on the point of being abolished, by an act of the legislature, in the reign of James I., as it had passed the House of Lords, and was sent down to the Commons. There are very few examples of wager of battle on record, and in most of these the battle was never actually fought. In an appeal brought by the Duke of Hereford, against the Duke of Norfolk, the combatants were separated, by the king's command, just as they were about to engage, and both banished the kingdom; the appellee for life, and the appellant for ten years. The last instance of wager of battle, in an appeal of treason, was in the 6th year of Charles I., when the court of the Constable and Marshal was held by the Earl of Lindsey and the Earl of Arundel; which was terminated by the king's superseding his commission. In this same reign, a trial by battle, in a writ of right, was commenced; but when the two champions were in the lists, an error was found in the record, and the parties were not permitted to join battle. The king, in this instance, had previously, by an order in council, referred it to the judges, to consider how it might be avoided, and declared that, if justice could be done in no other way, he would consent to the trial by duel.

Barringt. Obs. 296. Lords' Jour. March 23, 1623. Dyer, 301. Co. Car. 512. Spel. Gloss. ad Voc. Campus. Tyrr. Hist. vol. iii. 998. Barringt. ubi supra. Rushw. Coll. pt. ii. vol. i. 112. 128.

Wager of law, a trial of nearly as great antiquity as the former, appears to have been, in the time of Lord Coke, as much in use as ever, if we may judge by his ample manner of treating the subject; but being at all times limited in its application, it naturally fell into disuse when the actions in which it was applicable fell away. Thus an action of debt, in which law wager was allowed, was now superseded by an action of *assumpsit;* so, likewise, an action of detinue, by that of trover; and an action of account by a bill filed in equity.

1 Inst. 295

Ante, p.283. 3 Comm. 347.

The last, and most favoured of all the modes of trial, had, as may be seen from different parts of this work, been making its way so effectually as almost to supersede every other species of trial. In many cases where the abovementioned trials are applicable, it has since been in the dis-

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Ante, p. 285.

Ante, p 116. 155. 180.

cretion of the court, if they were not satisfied, to refer the matter in question to a jury. No subject, as may be seen, engaged the attention of the legislature more than that of juries, in order to render them efficient in the administration of justice. In the early institution of this trial, great apprehensions were entertained of their integrity; wherefore, in civil matters, they were subjected to an attaint, and, in criminal matters, they were altogether under the direction and control of the court, which considering the description of persons that could then be found to constitute a jury, was probably needful. The punishment by attaint having been found ineffectual, notwithstanding the alterations made by statute, it had for some time gone out of use. Sir T. Smith, who lived in the reign of Edward VI. speaks of its disuse in his day, and ascribes it to the reluctance which men felt to inflict so severe a punishment on their neighbours. To obviate these inconveniences, it was now become the practice to set aside the verdict and grant a new trial, in all cases where it appeared to the court that it would best meet the justice of the case. When juries were first employed in criminal matters, it was not an unusual thing to award a *venire de novo*, when the jury had eaten or drunk, or committed any gross irregularity in giving their verdict; but afterwards it became a maxim in law, that a man should not be compelled to answer twice for the same offence. As the same objection did not operate in civil suits, the practice of granting new trials, though at this period fluctuating and irregular, became in process of time established.

Smith's Rep. Angl. l. 3. c. 2.

3 Inst. 222. Baringt. Obs. on stat. Westm. 1.

New Trials. 24 Ed 3. 24.

11 Hen. 4. 2.

In former reigns, we read of frequent instances of severity practised upon jurors for giving verdicts contrary to the opinion of the judges; but it was held in this reign, in the case of Bushel, a juryman, who was imprisoned for giving a verdict of acquittal on the trial of Penn and Meade, that jurymen were not punishable for the verdict which they gave.

Ld. Herbert. Hist. Hen. 8. 6.

Smith de Rep. l. 3. c. 2.

Vaugh. Rep. 152, et seq.

We have seen that, in the reign of Richard II., the practice of laying the venue at the pleasure of the parties

Ante, p 331.

was restricted by a statute; in confirmation of which, a statute, in the reign of Henry IV., directed attornies to be sworn that they would make no suits in a foreign county. The cour's acting up to the spirit of these statutes, made a severe rule against attornies who offended in this particular. They likewise, at an early period, allowed a wrong venue to be pleaded in abatement of the writ, even before the plaintiff had declared; but, as this course of proceeding was attended with delay, they at length thought proper to exercise their discretion, and change the venue, on motion, whenever it appeared most likely to further the ends of justice.

CHARL. II. Stat. 4 Hen. 4. c. 18. Tidd's Prac. 621. Rast. tit. Debt. 184. Trye's Jus. Fil. 231.

The ancient principles of the criminal law were now in two or three points modified. The killing a man, according to Staunforde, was either justifiable *se defendendo*, or *per infortunium*, which he explains after the manner of Bracton; if it was not either of these, then it was voluntary and felonious homicide, the more heinous kind of which was murder, and the less heinous chance medley. Murder, according to the old law, signified a secret killing; but it had, long before this time, been held to be a killing with malice prepense, or forethought. Manslaughter, another species of voluntary homicide, was the killing without malice or forethought, which was also a felony; but by a merciful construction of the statutes, in the reigns of Henry VIII. and Edward VI., was held to be felony with benefit of clergy.

Criminal law. Staunf. P.C 13. Lamb. Eiren. 218. Co. 3 Inst. 55.

Involuntary homicide, or homicide *per infortunium*, was described as in former times, but that species of it, namely, homicide *se defendendo*, was now relieved from the forfeiture to which the party, though proved to have done the deed in pure self-defence, was formerly subjected. Robbery was defined by Staunforde, according to the old law, to be the taking any thing from a person feloniously, though the thing taken was not worth a penny; but by a later writer, the putting in fear was said to be an essential ingredient in the offence, and has ever since been so considered. In the reign of Edward VI. burglary was held to be the breaking into a house by night only, which is the first instance on record,

Staunf. 16. Staunf. 27. Co. 3 Inst. 68. Bro. Cor. 185.

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where the time of committing the act entered into the nature of this offence. Larceny at common law remained the same as it had been from the time of Edward IV., but it had received numerous accessions by statute.

1 Comm. 136. 2 Hawk. P.C. c. 33. Ante, p 300. Stat. 39 El. c. 4. Barringt. Obs. 269. Stat. 18 Car. 2. c. 4. 2 Woodd. 498.

It has been said that banishment was a thing unknown to the common law, and that it was first introduced by the legislature in the reign of Queen Elizabeth; but it is worthy of observation, that Bracton speaks of exile as an ordinary punishment in his day. By the statute of Elizabeth it was enacted, that such rogues as were dangerous to the inferior people should be banished the realm. And by a statute in this reign the judges were empowered to sentence to death, or to transportation to the colonies of North America the moss troopers of Cumberland. This appears to be the first statute in which transportation is mentioned.

Study of the law.

It has already been stated, that among the exercises which were appointed for the use of the students, that of reading on the statutes existed at an early period; the object of which was to explain the construction to be put upon new statutes, a practice that must have been of great utility before the introduction of printing. It appears, however, to have ceased in this reign with Lord Keeper Guildford, who is said to have been the last that kept his public reading in the hall. The expensive entertainments, which the readers were obliged to give, was probably one cause of the discontinuance of these readings. Another sort of exercise in the inns of court were called moots, which, from the Latin *moveo*, to move, agitate, or debate, signified arguing of cases. These moots were usually performed by students of a certain standing, preparatory to their commencing practice. Mootmen, in Lord Coke's time, were those who argued readers' cases in houses of Chancery, both in terms and grand vacations. Of mootmen, after eight years' study, were chosen utter barristers; so called because they pleaded without the bar; and after twelve years, utter barristers were chosen benchers, from whom were chosen the readers, and from the latter was chosen the attorney and solicitor general,

North's Life of Lord Guildford.

3 Rep. 19. Dugd. Orig. Jur. 144. Wynne's Eunom. Dial. 2.

as also one or two serjeants, and from the serjeants were chosen the judges.

Inns of court and Chancery.

The qualifications of candidates for the bar were an object of great concern from the earliest period, as may be gathered from the orders and regulations made from time to time, either by the command of the king, or by the direction of the judges, or by the societies themselves. The profession was, as we have seen, confined in Fortescue's time to people of family, and in the spirit of those times we find, that in the reign of James I., no one could be admitted into the inns of court that was not a gentleman by birth. The qualification of learning was insisted on at all times, particularly in the order in the 38th of Elizabeth. To this end it was a constant rule to restrain practice at the bar for a certain time after a person had been called, which, for the most part, was five years, but was reduced in this reign to three years. The spirit of those regulations has been preserved in the subsequent orders of these societies, which have respect to such of their members as prepare themselves for the study of the law by a university education.

Dugd. Orig. Jur. 147. 243. 273. Wynne's Eunom. Dial. 2.

Wynne, ubi supra.

Those who followed the practice of the law were, at one time, altogether excluded from being called to the bar; but this has been in some measure altered. In respect to attornies, a statute in the third year of King James I. required that none should be admitted attornies in any of the courts at Westminster, but such as had been brought up in the same courts, or were otherwise well practised in their profession. In confirmation of this statute, rules of court had been made, requiring that attornies should be subject to an examination before they were admitted, and a certain number of able practisers of the courts were appointed yearly, whose business it was to examine such as should desire to be admitted.

Ibid.

Tidd's Pract. 55.

We may now close our account of the law societies, by stating the changes which they had undergone since the reign of Edward IV. Lincoln's Inn, which originally belonged to the earls of Lincoln, was afterwards leased by the

Dudg. Orig. Jur. 231.

bishops of Chichester to the students of the law, the interest of which coming to Sir Edward Syliard, he sold it in the reign of Elizabeth to the benchers for five hundred pounds.

Dugd. Orig. Jur. 145, 146.

The society of the Temple was, in consequence of the increase of students, divided into two in the reign of Henry VIII., namely, the Inner and Middle Temple. They held their houses by lease until the reign of James I., when they had a grant thereof made to Sir Julius Cæsar, the chancellor of the king's Exchequer, and Sir Henry Montague, recorder of the city, and others. The registers of this society commence from the latter end of the reign of Henry VII. Gray's Inn, which was demised in the reign of Edward IV., by the prior and monks of Sheene in Surrey, to the professors of the law, was, after the dissolution of the monasteries, granted to them by Henry VIII.

Dugd. 143. Seld. Notes to Fort. c. 49. Dugd. 270. Ibid. 187. Ibid. 310. Ibid. 187. Spelm. Rel. 212.

The inns of Chancery remaining at this time were as follow: 1. Thavies' Inn, granted to the benchers of Lincoln's Inn in the reign of Edward VI. 2. Bernard's Inn, belonging to Gray's Inn. 3. Furnival's Inn, purchased by the society of Lincoln's Inn in the reign of Edward VI. 4. New Inn, belonging to the Middle Temple. 5. Clement's Inn, demised to the society of the Inner Temple. 6. Clifford's Inn, came first by lease, and afterwards by grant, to the Inner Temple. 7. Staple's Inn was first held by lease, and afterwards was granted to the society of Gray's Inn. 8. Lyon's Inn belonged to the Inner Temple from the reign of Henry V., if not before. Strand Inn or Stronde Inn was an inn of Chancery in the reign of Henry VIII., and probably long before, and belonged to the Middle Temple; this, together with the Bishop of Worcester's Inn, and the Bishop of Coventry and Litchfield's house, commonly called Chester Inn, with some other houses, were all pulled down, to make room for the building of Somerset House for the Duke of Somerset. These inns of Chancery were inhabited by attornies, who at this time were expected to reside there.

Reports.

The sources of legal information had been much enlarged since the reign of Henry VIII., by the number and excel-

lence of the reports which were made from time to time of the cases adjudged in the different courts of law; but principally at this period in the courts of King's Bench and Common Pleas. The names of the reporters most entitled to notice are here given in a chronological series, namely, Jenkins, Benloe, and Dalison, cited by Lord Coke as New Benloe, Dyer, *temp.* H. 7, and 8, E. 6, M. and E. Plowden, *temp.* E. 6, M. and E. Owen, *temp.* M. and E. Leonard and Moore, M. E. and J. 1. Anderson and Saville, *temp.* E. Coke, Popham, Leonard, Yelverton, Hutton, Brownlow and Goldborough, *temp.* E. and J. 1. Hobart, Tothill (reports in Chancery), Croke, Bulstrode, Sir Wm. Jones, Rolle, Davis (reports of cases in the Irish courts), J. 1. and C. 1. Latch, *temp.* C. 1. Style, *temp.* C. 1 and 2. Kelyng, Keble, Saunders, Ventris, Lutwyche, Sir Thos. Raymond, Pollexfen, Skinner, Siderfin, Shower, Vaughan, Vernon, *temp.* C. 2.

Of the above, Dyer, Plowden, Croke, and Coke, hold the first rank in public estimation. These were all originally written in French, but have been severally translated into English. The reports of Sir Edward Coke are, by distinction, cited 1, 2, 3, &c. Rep., without mentioning the name. Croke's reports are commonly cited Cro. Eliz., Cro. Jac., and Cro. Car.

The most important treatises on the law were from the pen of Staunforde, Lambard, Manwood, Crompton, Kitchen, Coke, Bacon, West, Style, and Sheppard. Sir William Staunforde was the first who wrote on the pleas of the crown, in which he imbodied the principles of criminal law laid down by Bracton and Britton. Lambard was the author of Eirenarchia, or the Office of Justice of the Peace, Archaionomia, or the Ancient Laws of the English, and other works. Manwood, on the Forest Laws; Crompton, on the Jurisdiction of Courts; and Kitchen, on Courts, are well known by their respective works. Sir Edward Coke, the illustrious commentator on Littleton, wrote four volumes, which he designates Institutes; the First Institutes is the

Commentary on Littleton's Tenures; the Second Institutes contain an exposition of Magna Charta, and other statutes in the reign of Henry III. and Edward I. and II.; the Third Institutes treat of criminal law, and the fourth Institutes, of the jurisdiction of courts. He likewise wrote the Complete Copyholder, and other small works, which were published in a selection of law-tracts by Serjeant Hawkins in 1764. Among Bacon's law-tracts will be found, his Treatise on the Use of the Law, and his reading on the stat. of Uses. Sheppard's Touchstone of Common Assurances is one of his most esteemed works, which has passed through several editions. In regard to the practice of courts, West's Symboleography, which is a collection of forms and precedents, and Style's Practical Register, containing the rules and orders of courts, are in considerable repute.

CHAPTER XXXIV.

JAMES II. to GEORGE IV.

Succession to the Throne determined in Parliament.—Statutes of William and Mary.—Bill of Rights.—Dispensing Power of the Crown abolished.—Mutiny Act.—Exclusion of Papists from the Throne.—Council allowed to Prisoners on Indictments of Treason.—Appointment of the Judges.—Royal Mines.—Toleration Act.—Aliens.—Arbitration.—Resisting Process.—Benefit of Clergy.—Statutes of Anne.—Privilege of Ambassadors.—Copy-Right.—Pressing Seamen.—First Fruits.—Vicinage.—Attornments.—Union of England and Scotland.—Statutes of George II.—Marriage Act.—English Language.—Statute Law under George III.—Appeals and Trial by Battle abolished.—Union of England and Ireland.—Abolition of Slave Trade.—Statute Laws of George IV.—Law Reports.—Law Treatises.

WHAT remains to be said to complete this history of English Law, will principally relate to the changes introduced by statute.

Succession to the throne determined by parliament.

The reign of James II. would not have been entitled to a place in this history, if it had not been for the manner of its termination as connected with the privileges of parliament. It has already been shown, that the succession to the throne was in particular cases referred to the decision of parliament. Consistently, therefore, with this admitted principle, the two houses of parliament assuming, on the departure of King James out of England, that the throne was vacant, appointed a successor in the persons of William and Mary, by which they fully established their right to regulate the succession to the throne in extraordinary emergencies.

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W. and M.

Statutes of William and Mary.

The circumstances under which William and Mary came to the throne being favourable to political liberty, several statutes were passed in the first year of their reign tending still farther to abridge the prerogative of the crown. The coronation oath was altered so as to make it more suitable to the existing state of things. The old coronation oath, which was probably derived from the Saxons, and is referred to by ancient writers, was, as the statute alleges, framed in doubtful terms with relation to ancient laws and constitutions. The statutes referred to, known by the name of the Bill of Rights, contained many provisions in favour of the subject, which were for the most part in affirmance of the common law, or of previous statutes, as to the right of petitioning, the right of carrying arms for defence, and of applying to courts of justice for redress of injuries, freedom of speech in parliament, freedom of elections, and the like.

Bill of Rights.
Mir. c. 1. s. 2.
Bract. l. 3. c. 9.
Stat. 1. W. and M. st. 2.

Dispensing power of the crown abolished.

Besides, the power of dispensing with the laws in any case was now taken from the crown, a power which was derived from those times when the administration of justice was exclusively in the hands of the king, and had heretofore been exercised by our kings at their discretion, while parliament was in its infancy, and a statute was not supposed to interfere with the prerogative of the crown. A clause therefore used frequently to be introduced into statutes and letters patent, entitled from the first words of it a *non obstante*, that is, notwithstanding, which served as a licence to do a thing which otherwise a person would be restrained by act of parliament from doing. For the putting an end to this power it was now enacted, that no dispensation by a *non obstante* of or to any statute should be of any effect, except such dispensation was specially provided for in the act. By another clause of this act the crown was restrained from keeping a standing army, or levying any sort of tax on the subject without consent of parliament; but that the king might be armed with power to preserve discipline in the army, a mutiny act was expressly passed in the second year of this king which has ever since been annually renewed[1].

Mutiny Act.

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This contains a code of laws and regulations for the government of the army and punishment of all military offences, particularly mutiny and desertion, which constitute our present military law, and by which our courts martial have ever since been modelled.

Exclusion of papists from the throne.

The exclusion of papists from the throne had been unsuccessfully attempted during the reign of Charles II., when a bill passed the House of Commons to that effect, with the express view of setting aside the Duke of York, the presumptive heir, on the score of his being a papist. This was thrown out at that time in the House of Lords, but carried with facility in this reign, when it was enacted, that every person holding communion with the see of Rome should be for ever incapable to inherit or enjoy the crown of England.

Stat. 12 W.

Counsel allowed to prisoner on indictment of treason.

As, by the common law, prisoners were not allowed counsel on an indictment of treason, unless some point of law arose proper to be debated; and by this restriction they were subjected to many hardships, a statute in the 7th year of this king empowered the justices in such cases to assign counsel not exceeding two. This privilege was extended by a statute in the subsequent reign to cases of parliamentary impeachments.

3 Inst. 29. Finch. L. 386. Stat. 20 Geo. 2. c. 30.

Appointment of the judges.

The common law recognised the king as the fountain of justice and general conservator of the peace of the kingdom, whose prerogative it was to appoint and remove all officers and ministers of justice at his pleasure; this was now restricted by a statute in regard to the judges, whose commissions were to be made, not as formerly, *durante bene placito*, but *quamdiu se bene gesserint*. They might, however, be removed by an address of both houses of parliament. By another statute it was declared, that their patents of commission, which heretofore became vacant at the demise of the king, should continue in force for six months after the death of the king or queen.

2 Hawk. P. C. c. 1. Stat. 13. W. 3. c. 2.

Stat 7 and 8 W. 3. c. 27. 2 Hawk. P. C. 3.

Royal mines.

By the common law, if gold or silver were found in any mine of base metal, or as some supposed, if the value of the gold or silver found therein exceeded that of the base metal,

Plowd. Case of Mines.

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1 Comm. i. 294. 2 Inst. 577. Stat. 1 W. and M. St. 1. c. 30. 5 W. and M. c. 6.

the whole would become a royal mine; but as this law impeded the working of the mines by subjects, lest, if they contained any gold or silver, they should be claimed by the king, a statute in this reign declared, that no mines on that account should be claimed as royal mines, but the king, or the person claiming for him, should pay for the base metal a certain price.

Toleration Act. 1 W. and M. c. 18.

The statutes passed in the preceding reigns, which affected Protestant dissenters as well as Roman Catholics, were conditionally suspended in favour of the former in this reign, by the act well known by the name of the Toleration Act, which exempted all such persons from the penalties of nonconformity, on their taking the oaths of supremacy and allegiance, and making and subscribing declarations against popery, and declaring their belief in the Trinity. By the same statute it was enjoined, that their meetings should be held in houses that were unbarred, unbolted, and unlocked, and all persons were prohibited from disturbing or molesting them. The papists were not only excluded from the benefit of this act, but more rigorous laws were made against them.

Stat. 1 W. and M. st. 1. c. 17.

Persons refusing to make the declaration against popery, prescribed by the stat. 30 Car. II. st. 2, were to be treated as popish recusants, to be prohibited from residing within ten miles of London, to be suspended from their seat in parliament, not to be allowed to have any arms, not to keep a horse above the value of *5l.*, or to present to any vacant benefice. All the laws affecting Roman Catholics and dissenters, except such as exclude Roman Catholics from the throne and some high offices of the state, have since been repealed.

Stat. 9, 10 Geo. 4.

Aliens. Stat. 11 and 12 W. 3. c. 6. Stat. 12. W. 3. c. 2.

By the common law, neither a denizen nor an alien could take land by inheritance; but a statute in this reign permitted natural-born subjects to derive a title by descent, through their parents, or any ancestor, though they were aliens. But by another statute, which passed from a jealousy of King William's partiality to foreigners, it was expressly provided, that no alien or denizen could, by reason

of any act of naturalization, be capacitated to hold a seat in the privy council or in parliament, or to hold offices, grants, &c.

CHAP. XXXIV. Wm. III.

The old law of amercing the defendant in a suit, when judgment was for the plaintiff, was now so far altered, that the plaintiff was to pay 6*s.* 8*d.*, and be allowed it among his costs against the defendant.

Stat. 5 and 6 W. & M. c. 12.

Several parliamentary provisions were made in affirmance of those made in former reigns, in order to render the proceedings in a suit less burdensome to the suitor. Before this reign, it was necessary to bring up, by *habeas corpus*, to the courts at Westminster, a defendant who was a prisoner, in order to charge him with a declaration; but it was now ordered, that the declaration should be left with the turnkey or porter of the prison. Formerly, a plaintiff could not state in his declaration, that the defendant was in the custody of the sheriff; and was, in consequence, obliged to sue out a *habeas corpus cum causa*, and then turn the prisoner ever to the marshal or warden; but it was now provided that he might declare against the prisoner in the custody of the sheriff, or any officer. As special bail could be put in only before a judge in town, which was often attended with expense and inconvenience, this evil was remedied, by the judges being empowered to appoint commissioners for that purpose in the country.

Stat. 8 and 9 W. 3. c. 27.

Tidd's Prac. 272.

Stat. 4 and 5 W. 3. c. 21.

Arbitration was a mode of deciding disputes, of which we read in the year-book of Edward II.; and the judgment, called in that case an award, was held to be as valid as the judgment of a court; this course of proceeding had not, however, heretofore been employed in complicated questions of real property: wherefore, to render it as extensively available as possible, a statute of this reign established the use of arbitration in all cases where the parties were willing to end any controversy, suit, or quarrel, in this manner. The award was, in this case, made conclusive in the courts against all the parties, whose agreement to abide by it was

Arbitration.

3 Comm. 153.

Stat. 9 and 10 W. 3. c. 15.

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proved, unless the award was set aside for corruption or misbehaviour in the arbitrators.

Resisting process. Ante, p 502.

Although the law of sanctuary was expressly abolished in the reign of James I. yet needy and unprincipled people continued to resort to the places heretofore privileged, and under that pretext ventured to resist the execution of lawful process; wherefore, to obviate these inconveniences, it was found necessary to declare, by an act of the legislature, the offence of obstructing justice in such pretended privileged places to be highly penal.

Benefit of clergy. Stat. 10 and 11 W. 3. c. 23.

Stat. 5 Ann. c. 6.

Stat. 4. 69 Geo. 1. 16. 24 Geo. 2. 19 Geo. 3. 1 Geo. 4. Stat. 6, 7, 8 Geo 4.

The punishment of burning in the hand, in case of any clergyable felony, was altered to burning in the cheek; but, as this was calculated to make offenders desperate, the punishment of imprisonment, and keeping to hard labour, for a period not less than six months, and not exceeding two years, was substituted in its place, by a statute of Queen Anne; by which statute it was also enacted, that reading should not be required to entitle a person to the benefit of clergy. Although the old law of clergy was thus absolutely done away, yet the term has been since retained for the purpose of distinguishing offences that were subject to a less punishment than death. Numerous provisions have been made by statutes since that period, either for the purpose of taking away the benefit of clergy from some offences, or granting it to others; as also for regulating the punishment of such offenders as were entitled to their clergy. By the last statutes on this subject, in the reign of his present Majesty, burning in the hand, and many other formalities connected with the treatment of persons guilty of clergyable felonies, have been altogether done away, so that probably, at no distant period, the term benefit of clergy will be remembered only in history. The statute of 28 Hen. VIII. which placed actual clerks on the same footing with other persons as to felonies, was revived by stat. 6 Geo. IV. c. 25, which did away with a distinction that had caused much dissatisfaction from the period of its commencement at the Conquest.

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The prerogative of the crown having been exerted to its own prejudice, by the improvident grants of the demesne lands by many of our kings, particularly King William III., it was one of the first acts of this queen's reign to restrict the grants or leases from the crown to a term not exceeding thirty-one years, or of three lives, except with regard to houses, which might be granted for fifty years.

Statutes of Anne. Stat. 1 Ann. c. 7.

In consequence of the arrest of an ambassador from Peter the Great, czar of Russia, it was found necessary to define the law by an act of parliament, the preamble to which recites the arrest which had been made "in contempt of the protection granted by her majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors, and other public ministers, have at all times been thereby possessed of, and ought to be kept sacred;" and enacts that, for the future, all process, whereby the person of any ambassador, or any of his servants may be enacted, shall be utterly null and void.

Privilege of ambassadors.

The question, as to the rights of authors in their productions, appears to have been so far considered in this reign, that a statute declared that the author and his assigns should have the sole liberty of printing and reprinting his works for the term of fourteen years, and no longer, unless the author were living; in which case he was to enjoy the right for another term of fourteen years, but this was amended by subsequent statutes, particularly by that in the 54th year of his late majesty, which changed the conditional term of fourteen years, to twenty-eight absolutely, and to the end of the author's life. The same privilege was granted by other statutes to the inventors of prints and engravings. How far the rights of authors were protected by the common law has been since a much litigated question. In the court of King's Bench, it was held that an exclusive and permanent copyright subsisted in authors by the common law; but this judgment was, in a subsequent case, reversed by the House of Lords.

Copyright. Stat. 8 Ann. c. 19. Stat. 4. 15 and 54 Geo. 3. Stat. 8 Geo 2. 7 and 17 Geo. 3. 2 Com. 407.

An attempt was made, in the preceding reign, to do away

Pressing seamen.

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Stat. 7 and 8 W. 3. c. 21.
Stat. 9 Ann. c. 21.
Foster, 154.

with the practice of impressing seamen, by substituting a register of seamen in its place; but, being found ineffectual, and at the same time oppressive in its operation, the ancient practice was revived by a statute in this reign. As this practice was so repugnant to the spirit of the constitution, many were disposed to call in question its legality; but it scarcely admitted of a doubt in any court of justice, as has been ably shown by Sir Michael Foster.

First-fruits.
Ante, p.448.
2 Burn. Ecc. L. 260.
Stat. 2 Ann. c. 11.
Stat. 5, 6 Ann. 1.
3 Geo. 1.

The *primitiæ*, or first-fruits, which, in the reign of Henry VIII., were annexed to the crown as a part of the revenue, were granted by this queen, by her royal charter, which was afterwards confirmed by statute, for the augmentation of small livings; and has, therefore, appropriately been denominated Queen Anne's bounty. This was afterwards regulated by subsequent statutes

Vicinage.
Ante, p.286.
Wynne's Eunom. Dial. 3.
Stat 4, 5 Anne, c. 16.

The old law of vicinage was now done away by a statute, after having long and gradually fallen into disuse. The stat. 35 Hen. VIII. c. 6, limited the number of hundredors to six, and the stat. 27 El. c. 6, reduced it to two; and, finally, the statute of Queen Anne made an end of all hundredors, in requiring the *venire* to be awarded in all personal actions from the body of the county; but, in crown prosecutions, the practice still continued of keeping the jury within the pale of the same hundred.

Attornments.
Stat. 4 Ann. c. 16.

Although the necessity for attornments was removed by the changes which the law of real property had undergone, particularly by the introduction of uses, yet there were cases still remaining in which they were found expedient to get the attornment of the tenant; wherefore, by a statute in this reign, it was enacted, that all grants and conveyances of manors, lands, &c. by fine or otherwise, should be good without the attornment of the tenant, provided notice was given to him of the grants. By a statute, in the reign of George II., attornments of lands, &c. made by tenants to strangers claiming title to the lands should not prejudice the landlord's possession.

Stat. 11 Geo. 2. c. 19.

Union of England and Scotland.

The union of England and Scotland, which, in the reign

of King James, was projected and very much desired, was now happily effected in the 6th year of this queen, by an act of the legislature, from which time all acts of a general nature extended to England and Scotland, which were comprehended under the name of Great Britain.

Stat. 6 Ann.

For the prevention of clandestine marriages, some parliamentary provisions were made in the two preceding reigns; but the most important regulations were made by an act in this reign, which has, by distinction, been entitled the Marriage Act, by which all the modes of solemnizing marriage by banns, licence, and special licence, are minutely defined.

Statutes of Geo. II.

Stats. 6 and 7. 7 and 8 W. 10 Ann.

Marriage Act.

26 Geo. 2. c. 33.

An alteration was made in the proceedings of courts in this reign which thoroughly re-established the use of our native tongue, that had, as before observed, from a variety of causes, been banished from the courts of law since the Conquest. To this end, it was enacted, that matters of record, indictments, pleas, verdicts, and judgments, which had heretofore been in Latin, should for the future be in English; but it was found necessary to explain, by a subsequent statute, that the statute was not to extend to such phrases as *quare impedit*, *nisi prius*, and others. It is worthy of observation, that the French continued in use among lawyers, in taking their notes, even as low down as the reign of Charles II.

English language.

Ante, p.269.

Stat. 12. Geo.2. c. 26.

As a proof of the immense additions which were made to the statute law in the reign of his late majesty, it will only be sufficient to observe, that the statutes of this king comprehend nineteen thick quarto volumes, while those from Henry III. to William III. are included in three comparatively small quarto volumes. Out of this immense collection of statute laws there are but few points that fall within the scope of this work.

Statute law under Geo. III.

The abolition of appeals, and the trial by battle, was one of those measures for which the reader must have been fully prepared; and yet this law would, probably, not have passed at that period, at least as far as respected appeals, if an at-

Appeals and Trial by battle abolished.

Stat. 59 Geo. 3. c. 46.

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tempt had not been made to revise the trial by battle, in an atrocious case of murder.

1 Barn. and Ald. 405.

The acts relating to Ireland, which terminated in its union with Great Britain, are particularly entitled to notice at this period.

The question having been much agitated during the reign of George I., as to how far the Irish parliament was or ought to be dependent upon the parliament of England, it was thought necessary to declare expressly, by an act of the legislature, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain; and that the king's majesty, with the consent of the Lords and Commons of Great Britain, in parliament, had power to make laws to bind the people of Ireland. Two statutes were passed in the early period of this reign, which went to the repeal of that statute, and declared that in all cases the people of Ireland should be bound only by laws enacted by his majesty and that parliament; and that no appeal, or writ of error, from the courts in Ireland, should, for the future, be brought into any of the courts of England. After this period several acts were passed in the Irish parliament, for the regulation of the different departments of government as a separate kingdom; the inconvenience of which being sensibly felt, led to that act of the legislature in the 40th year of this king, which united the kingdoms of Great Britain and Ireland into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.

Stat. 6 Geo. 1. c. 5.

Stat. 22 Geo. 3. c. 53.

23 Geo. 3. c. 28.

Union of England and Ireland.

Stat. 40 Geo. 3. c. 67.

Abolition of slave-trade.

Another public measure of this reign is entitled to notice, which, on the score of humanity, is not inferior in importance to the one just mentioned, namely, the abolition of the nefarious traffic in slaves. This bad practice commenced in the reign of Elizabeth, and was carried on for a number of years without exciting the attention of the legislature in any particular manner. The first statute we meet with on the subject, was passed in the reign of Queen Ann, in affirmance of laws

that were in force in the English plantations, to prevent the carrying slaves off the island without the owner's consent. Several statutes were passed in this reign, with a view of diminishing the evils of this trade, and restricting the traffic; and after many fruitless attempts on the part of the friends of humanity, the object was at length obtained in the 47th year of this king, of procuring the total abolition of the trade, not only as regards our own country, but also as respects other states, so far at least as it has been hitherto practicable. Treaties have been entered into with the kings of Spain, Portugal, and others, for the purpose of carrying into execution the acts of the English legislature.

Stat. 28, 29. 31. 37 Geo. 3.

Stat. 58, 59 Geo. 3. 5 Geo. 4. c. 113.

Statute laws of Geo. IV. Stat. 7 Geo. 4. c. 29.

The principal laws entitled to notice in the reign of his present Majesty, are those which relate to the criminal law, and the administration of criminal justice. The law of larceny, drawn from the common law and the statute law, is imbodied into one act, by which, at the same time, all the statutes of former reigns, bearing on the subject, are repealed. In a similar manner the several laws relating to malicious mischief are repealed, and their principal provisions imbodied into one act. The old law of *voluntas reputabitur pro facto*, is revived by one clause, which makes it felony to assault with intent to rob. The forms of administering justice, particularly in criminal cases, are now simplified. The simple plea of "Not guilty," is sufficient, without any of those forms heretofore used. Where a prisoner refuses to plead, the plea of "Not guilty" may be recorded, and the trial proceeded in. Every peremptory challenge beyond the number of challenges allowed by law, shall henceforth be void. By the old law, those who challenged peremptorily thirty-six were deemed to stand mute, but this provision does away with the old law respecting standing mute. By another statute, the solemnity of passing sentence of death was to be confined to such cases only, where, by the judgment of the court, it is deemed fit to be put into execution. In other cases, where the punishment of death may be com-

Ibid. 30. Ante, p.291.

Ibid. c. 28.

Ante, p.312.

Ante, p.303. Stat. 4 Geo. 4. c. 48.

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muted, judgment of death is to be recorded. By another statute, the degrading treatment of the bodies of persons who committed *felo de se*, is altered, and the coroner is directed to see that the remains of one found *felo de se* are buried privately in the night-time in the churchyard, but without the performance of any of the rites of Christian burial. By another statute, the punishment of whipping women is abolished; and by another, the old law of attaints is abolished. For these improvements in the criminal law, we are indebted to the Right Hon. Robert Peel, after whom the acts of Parliament on this subject have since been named.

Stat. 4 Geo. c. 52.

Stat. 6 Geo. 4.

Law-reports.

The reports and law-treatises have kept pace with the accumulation of legal matter, which the increase of wealth, commerce, population, and the consequent accession to the business of the courts had naturally created. Instead of detached cases from all the courts, the cases in the several courts began, soon after the Restoration, to be distinctly reported.

Cases in parliament.

The old judicial proceedings in the High Court of Parliament are to be found in Ryley's Placita Parliamentorum, and Cotton's Abridgment. The first collection of parliamentary cases on appeals and writs of error were published by Sir Bartholomew Shower, after which, we have successively the reports of Brown and Bligh.

Chancery.

Several collections of cases in Chancery appeared soon after the reign of Charles II., under the different titles of Cases in Chancery, Select Cases in Chancery, Reports in Chancery, Precedents in Chancery, Abridgment of Cases in Equity, and Vernon's Reports; these have been followed successively by Gilbert's Cases in Law and Equity, Peere Williams's Reports; after which we have, in the reigns of George II., III., and IV., among the reporters in Chancery, the names of Eden, Brown, Vesey, sen. and jun., Beames, Ambler, Maddock, Cooper, Swanston, Simons, and Stuart, Turner, Jacob, Walker, and Russell; some of whom have also reported cases in the Vice-Chancellor's Court.

Exchequer.

Distinct reports of cases adjudged in the Exchequer, have likewise been made by Messrs. Bunbury, Parker, Daniel, Anstruther, Forrest, Wightwick, and Price.

Courts of King's Bench and Common Pleas.

Among those who have reported cases, both in the courts of King's Bench and Common Pleas, and occasionally in the Chancery and Exchequer, from the time of William III. to George III. and IV., will be found Comberbach, Carthew, Salkeld, Lord Raymond, Fortescue, Comyns, Gilbert, Strange, Kelynge, Wilson, Sayer. In the list of those who have reported separately in the King's Bench, are to be found the names of Barrow, Cowper, Douglas, Durnford and East (whose reports coming out regularly, have been denominated Term Reports), East, Smith, Maule and Selwyn, Barnewell and Alderson, and Chitty; among the reporters in the Common Pleas, are the names of Barnes, Willes, Wilson, Sir Wm. Blackstone, Henry Blackstone, Bosanquet and Puller, Taunton, Barnewell and Cresswell, Marshall, J. B. Moore, Broderip, and Bingham. Besides which there are, among the anonymous reports, the large collection, entitled Modern Reports, in twelve volumes, Cases of Practice, Practical Register, and New Reports of Cases in the Common Pleas. We have likewise Peake's, Espinasse's, Campbell's, Starkie's, Holt's, and Gow's Reports, at Nisi Prius, of cases in the King's Bench and Common Pleas; Marnott's, Robinson's, Edwards', Dobson's, and Acton's Reports, in the Admiralty Court; Phillimore's and Addam's Cases in the Ecclesiastical Courts.

The law-treatises may be divided, according to the particular branches of the law to which individuals have applied themselves, thus: we have on the subject of real property, and the modes of conveyance, Madox's Baronia Anglica, and Formulare Anglicanum; Somner and Robinson, on Gavelkynd; Bridall's Ars Transferendi; Sir Martin Wright and Gilbert on Tenures; Piggott on Recoveries; Fearne on Contingent Remainders; Fonblanque's Treatise on Equity; Cruise's Digest of Real Property; Gilbert and Sanders on Uses and Trusts; Watkins on Copyhold, on Devises, and

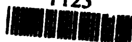
on Descents; Swinburne on Wills; Bacon on Leases and Terms; Toller on Executors; Preston on the Quantity of Estates, and on Conveyancing; Powell on Mortgages, on Contracts, and on Powers; Williams's Original Precedents; Barton's System of Conveyancing, and Barton's Precedents. On the subject of trade and commerce, we have Beauwe's Lex Mercatoria; Abbott (Lord Tenterden) on Shipping; Parke (Mr. Justice) on Insurance; Marshall, Annesley, and Burn, on Insurance; Sir Wm. Jones on the Law of Bailment; Cooke, Cullen, and Montague, on the Bankrupt Laws; Kyd's Law of Awards; Bacon on Arbitration; Paley on Principal and Agent; Chitty on Bills; Bayley (Mr. Justice) on Bills; Plowden on Usury; Pope's Abridgment of the Customs. On domestic policy, we have Bridall's Jus Sigli; Duke on Charitable Uses; Bott and Const on the Poor Laws; Chitty on the Game Laws; Simeon and Troward on the Law of Elections; Burn's Justice of the Peace. On the criminal law, we have Hawkins's Pleas of the Crown; Sir Michael Foster on the Crown Law; East's Pleas of the Crown; Leach on the Crown Law; Eden on Penal Laws; Chitty on Criminal Law; Russell on Crimes and Misdemeanors; Paley's Law and Practice of Summary Convictions; Jones, Holt, and Starkie, on the Law of Libel. On pleadings, we have Sir John Mitford's (Lord Redesdale) Treatise of Pleadings in Chancery; Beames's Pleas in Equity; Chitty on Pleading; Starkie and Archbold on Criminal Pleading; Stephen on Pleading. On the law of evidence, we have Peake and Phillips; on the Law of Costs, Sayer and Hullock; on Nisi Prius Law, Buller and Selwyn; on Actions, Booth on Real Actions; Gilbert, Runnington, and Adams, on Ejectment; Law of Trover. On the practice of courts, Gilbert's History and Practice of the Court of Exchequer, of the Court of King's Bench, and of the Court of Common Pleas; Maddock's and Newland's Chancery Practice; Beames's Orders in Chancery; Cooke's Rules and Orders in the King's Bench and Common Pleas; Boote's History of a Suit at Law: Tidd's Practice: Impey's Practice of the

Common Pleas. Among the digests and compendiums of the law, may be distinguished Rolle's Abridgment, Viner's Abridgment, Bacon's Abridgment, Petersdorff's Abridgment of the Common Law Reports, and Comyn's Digest, &c. And among the general treatises, Blackstone's Commentaries, Wood's Institutes, Sullivan's Lectures, Wooddeson's Systematical View of the Laws of England.

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